Tryals Per Pais:

OR, THE LAW of ENGLAND CONCERNING

JURIES

BY *NISI PRIUS*, &c.

Newly Reviſed, and much Inlarged, With an Addition of Precedents, and Forms of Challenges, Demurrers upon Evidence, Bills of Exception, Pleas *Puis le Darrein Continuance*, &c.

The Fourth Edition with Large Additions.

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Together with a New and Exact TABLE to the whole Matter.

Very Uſeful and Neceſſary for all Lawyers, Attornies and other Practiſers, eſpecially at the ASSISES.

By *G. D.* of the *Inner-Temple*, Eſq;

Per teſtes ſolum, lex ipſa nunquam litem dirimit, quæ per Juratam xij. hominum decidi poterit. Cum ſit modus iſte ad veritatem eliciendam multo potior, & efficacior, quam eſt forma aliquarum aliarum legum orbis. Forteſcue. Cap. 31

LONDON, Printed by the Aſſigns of *Rich.* and *Edw. Atkins*, Eſquires, for *B. Walthoe* in *Middle-Temple* Cloyſters, 1702.

To the Practicers of the Law.

Gentlemen,

IN the Dedication of Books, such persons should be chosen whose Studies and Profession agree with the nature of the Subject. To prove Conclusions in one Science, by the Heterogene Principles of another: To make a Grammariam Patron to a piece of the Mathematicks: To Dedicate a Treatise of Logick to a Master of Musick; or a Matter of Practice, to a Man of Speculation; would not only be improper, but absurd. You know that in the whole Practice of the Law, there is nothing of greater Excellency, nor of more frequent Use, than Tryals by Juries. In this, our Common-Law (and not without just cause) values it self beyond the Imperial Law, before the Canon Law, or any other Laws in the World. And seeing the hopes and life of all

the Proceſs, the force of the Judgment and the Truth, nay the Right of the Parties lie in the Tryal; for as one Elegantly ſays, Qui non probat, *at the Tryal,* dicitur veritate & jure carere, *and indeed the knowledge of all the* Law *tends to this: for without Victory at the Tryal, to what purpoſe is the Science of the* Law? *The Judge can give no Sentence, no Deciſion without it, and muſt give Judgment for that ſide the Tryal goes; therefore I may well ſay, 'tis the chief part of the Practice of the* Law: *And if ſo, to whom ſhould I offer this Treatiſe, but to you the Practiſers?*

I need ſay nothing for ſmall Tracts and Treatiſes; the infinite number of them in the Civil Law (*there being for every Title a diſtinct Tract*) *nay the number of them in our Law, ſufficiently ſhew their Uſe.*

Joachimus Forbus Ringelbergius *in his Book* De Ratione Studij, *giving directions what Books Students ought*

ought to carry with them, when they change places, and travel from one to another, tells us, That out of the Volums, (by reason of their bigness not portable) he used to tear out several leafs and take them with him in his Journeys, and so he said he had served the Works of Pliny, Tully, Plato, Demosthenes, *&c. although he had given great prices for them; which justifies the writing of this Treatise, the subject matter thereof being of such general use in all Circuits.*

When I read the elaborate Books of Farinacius de Testibus, *and the three Exquisite and incomparable Volums of* Mascardus de Probationibus, *in the Cæsarian and Pontifical* Laws, *(which Works were so valued and esteemed, that they were looked upon as new lights sent from Heaven, by the professors of those* Laws:) *I could not but see the defect and want of such Books in our Law: for surely they are as necessary in the one as in the other.*

And altho' I cannot compare my weak Endeavours with those Excellent and Methodical Works, theirs being intire, this only quasi *an Abridgment, fitted for use, not for show: Yet until more learned and judicious Proficients in in our Law shall undertake the Work, I thought fit to produce mine.*

To compare this sort of Tryal by Jury, *with the Tryals of other Laws and Countries, and declare how much and wherein it excels 'em all, after* Fortescue de laudibus, *&c. and his learned* Commentator, *would be like the arrogance of Limning after* Apelles, *and requires the room of a Volume, rather than an Epistle. And considering my own insufficiencies, I shall praise it more by saying nothing, than all I can: for to say less than a thing deserves, would be, instead of an Encomium, a disparagement. Therefore I shall content my self, only to say That Tryals in other Laws are by Witnesses only, privately examined; This, by Witnesses pub-*

publickly examined and confronted; and by Jury *also, and ſo conſequently the fact is ſetled with the greater certainty of truth, upon which the uprightneſs of the judgment depends.*

It would be well if there were leſs corruption in the returning of Juries; *but I think 'tis paralel'd, if not exceeded by that of examining Witneſſes privately, on whoſe Depoſitions, the Tryals in other Laws conſiſt: And ſo that muſt be no Objection againſt the thing. I hope an Expedient may be found out to prevent the Corruption in returning* Juries, *but I believe it never can in the other.*

To ſay this Tryal by Jury *is too popular in a Monarchy, would be a good Objection from a French-man, but not of any Engliſh-man, who lives under the beſt tempered Monarchy, and the beſt ſort of Government in the World, to which this manner of Tryal is ſo proper and well Accommodated, that neither the Wiſdom of our Anceſtors*

could,

could, nor (I may ſay) can this preſent, nor after Ages invent a better.

But as the unskilful Painter *drew a Curtain, before what he could not expreſs with his Pencil, ſo muſt I vail with ſilence, the Excellencies of this Celebrated* Tryal, *which I am not able to delineate.*

Gentlemen,

To make an Apology for the ſtile of a Law-Book, eſpecially of an Epitome, would be a vain thing, Ornari res ipſa negat contenta doceri; *neither ſhall I make any Apology for my undertaking this Work: If 'twas better perform'd, yet* Momus *would be carping; and if 'twas worſe, it wou'd be good enough for him, who cannot, or will not do it better: Be it what it will, your kind Reception will abundantly ſatisfie*

Your Servant,

G. Duncombe.

THE PREFACE TO THE FIRST EDITION.

THE Philosopher could not see a Man unless he heard him speak; *Loquere ut videam.* Speech is the Index of the Mind, and the Mind only discriminates the Man. For, although an *Ideot*, who hath but the shape of a Man, may with silence so hide his Folly, that strangers to his Manners cannot discern him from a Sophister: Yet doubtless, Silence is the greatest Enemy to Learning, the Grave wherein Oblivion buries the Parts and Knowledge of the bravest Spirits.

Where-

Hister. facil. Princeps.

Wherefore Learned *Saluſt*, from this takes his Exordium; *Omnes homines qui ſeſe ſtudent præſtare cæteris animalibus, ſumma ope niti decet, ne vitam ſilentio tranſeant, veluti pecora*: Thoſe Men who would excel Beaſts, ſhould labour that their Lives might not paſs in ſuch ſilence, as Beaſts do. It ſeems he deemed that Man little inferior to a Beaſt, who acted nothing to prolong his Memory: For this he held to be the Duty of every Man, ſaying, *Quo mihi rectius eſſe videtur, ingenii quam virium opibus gloriam quærere; & quoniam vitæ ipſa, qua fruimur, brevis eſt, memoriam noſtri quam maxime longam efficere*: In my Opinion, 'tis far better to acquire Glory by the Riches of Wit, than Strength; and becauſe our Lives are ſhort of themſelves, we ſhould indeavour by Ingenuity to Eternize their Memory.

Nullus dies ſine linea.

And to effect this, *Nulla dies abeat, quin linea ducta ſupereſt*; No day ſhould paſs over our Heads wherein we ſhould not act ſome memorable Exploit: Men ſhould not live like *Snails*, never ſtirring out of their Houſes; but be active (I mean not buſie bodies in other Mens matters, but) in their

their own Callings, of which the Wise *Cato* tells us, *Every Man ſhould give a reaſonable Account*: And if we believe the famous *Seneca*, *Nihil eſt turpius quam grandis natu ſenex, qui unicum habet vitæ ſuæ argumentum, quo diu ſe vixiſſe dicat, præter ætatem*: Nothing is more unworthy than an old Man, who has nothing to ſhew for his nativity, but a Gray Beard; whoſe Soul ſerved only as Salt to keep his Body ſweet, and is no ſooner dead, than forgotten, long before he is half rotten; yet who is ſo apt to deride the Endeavours of other Men, as this Ancient *Ignoramus*, whoſe wrinkles in his Face, worn-out Looks, and many Years, ſway more with the vulgar People, than all the Arguments of Law or Reaſon? Had *Seneca* been ſuch a ſilent *Mamus*, the World would never have been bleſt with his ſo Learned Works. And doubtleſs writing Books is needful in no Science more than in the Law. For without Books, how would the Lawyers do for Arguments at the Bar, or Reſolutions at their Chambers; whence the Oracle Sir *Edward Cook* pronounces this, *Omnes debere Juris-prudentiæ libris componendis animum adjicere*: That all Men ought to addict

Hist. facil. Princip.

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dict themſelves to the Compoſing Books of Law; ſome to the Reporting of the Judgments and Reſolutions of the Judges, who are *Lex Loquens:* and ſome to the Collecting of theſe Caſes and Reſolutions, methodizing and fitting them for ſome particular purpoſe, as *Littleton*, *Stamford*, *Fitzherbert*, *Crompton*, *Perkins*, *Finch*, &c. And indeed, moſt of the Law-Books extant, if not all (ſetting aſide the Reports) are nothing elſe, but Collections out of others. This I ſpeak, not in derogation of them, in the leaſt; for as 'tis equally, if not more laborious, ſo 'tis full as glorious, judiciouſly to cull Authentick Caſes out of the Volums of the Law (where ſo many are no Law) and rightfully place them in a particular Treatiſe, as 'tis to Report the Judgments and Reſolutions from the mouth of the Court; for the Reporter is but the Courts Secretary, and *Cook*'s Inſtitutes merit as much as his Reports; and *Aſh*'s Tables, *Fitzherbert* and *Brook*'s Abridgment are as uſeful as the Year-Books themſelves, of which kind of Collections, one Elegantly thus breaks out, *Quo quidem beneficio, haud ſcio, aut aliud aut legum*

Car-

Candidatis magis gratum, aut Reipublicæ magis commodum, aut divini honoris illustrationi magis idoneum, vel cogitando quidem consequi, quisquam poterit. Than which benefit I know not whether any Man can even imagine another, either to Lawyers more grateful, or to the Commonwealth more profitable, or for the Illustration of Divine Honour more fit. For with the least Labour, a small Price, and little Time, they present you with those Resolutions and Judgments which lye scattered in the Voluminous Books of the Law; which would otherwise cost much Time, Pains and Charges to find out. The thoughts of which publick good, first gave life to these Endeavours of mine: Not that any one should in the least imagine, that I am so guilty of vain Ostentation, as to believe, that my Parts or Abilities can perform any thing in this kind like other Men: No, *Ipse mihi nunquam Judice me placui.* I could never yet please my self with my own Labours, much less are they worthy to please others; *haud equidem tali me dignor Honore.* However, when I consider, that no Man hath yet written particularly concern-

ing

cerning this Subject, and of what general Use it is; I doubt not but that this Treatise will receive a favourable Construction from most men, and a plausible Acceptation from others.

The use of The Book.

The Use of it is in a manner Epidemical; since most mens Lives and Estates are subject to that Tryal *Per Pais*, here demonstrated; but in particular, the Practisers at Law (especially *Circuit-Advocates*, *Attornies*, *Solicitors*, *Clerks*, &c.) And all *Jurors*, (for whose Directions it is of singular Use) are chiefly concerned herein. But I will not hang a Bush out, to invite and prepossess your Judgments, *Vincat Utilitas*. The profit which every ingenious Reader shall gather out of it, will speak more for it, than the best Eulogical Preface.

And for my own part, I profess my self to be *Philomathes*, but not *Polymathes*. And notwithstanding the hard-favoured Objections which some men cast upon it, I really think the Study of the Law, to be the most pleasant Study in the World. And he which delighteth in the Study of any other Art or Science, must consequently be delighted with this. For the know-

ledge

ledge of the Law, as *Doderidge* ſaith is moſt truly ſtiled, *Rerum Divinarum humanarumque ſcientia*, and worthily imputed to be the *Science* of *Sciences*; for therein lies hid the Knowledge of every other Learned Science.

So that he which gives himſelf to the Study of Divinity, may here fill himſelf with holy and pious Principles of Divine Laws: For, *Lex eſt ſanctio ſancta, jubens honeſta, & prohibens contraria; ſanctum etenim oportet, quod eſſe ſanctum definitum*: The Law is a holy Sanction, or Decree, commanding things that be honeſt, and forbidding the contraries: Now the thing muſt needs be holy, which by definition, is determined to be holy. So that in this reſpect, ſaith *Forteſcue*, men may well call Lawyers, *Sacerdotes*, that is, givers or teachers of Holy Things. For the Laws being Holy, it follows that the Miniſters and ſetters forth of them, muſt be givers of Holy Things; and ſo by Interpretation doth *Sacerdos* ſignifie; and doubtleſs he which duly conſiders thoſe Rules of *Theology*, which lye ſcattered throughout the whole Body of the Law, muſt needs conclude our Laws to be Commentaries upon the Old and New Teſtament; and do ſo much

Forteſcue, Cap. 3.

much bear the Image *Legis Divinæ*, that they may well be attributed to the most High.

The Rules of *Grammar*, *Philosophy Natural*, *Political*, *Oeconomick* and *Moral*; as also the Grounds of *Logick*, and of other Arts and Sciences, so much abound in our Books, that the very reading of the Law will make a man *Master* of those Sciences.

And since *Rhetorick* is, *Ars ornate dicendi*, and consisteth of those two parts, *Elocution*, and *Pronuntiation*; How can we read in our Law-Books, those learned Arguments, Elegant Speeches and Judgments, pronounced with such Eloquence and Elegance of words and matter, and not conclude, That Rhetorick is the Glory and Grace of a Lawyer? though some (not gifted that way) would perswade us that the Law hath little relation to it.

If any man be delighted in History, let him read the Books of Law, which are nothing else but Annals and Chronicles of things done and acted from year to year, in which every Case presents you with a petit History; and if variety of matter doth most delight the Reader, doubtless, the reading of those Cases, (which differ like mens faces)

faces) though like the Stars in number, is the moſt pleaſant reading in the World.

I thought to have expatiated my ſelf in this Eulogical Commendation of the Study of the Law; but when I conſider the Glory of the thing it ſelf, I think it but in vain to light the Sun with Candles; and as no Arguments will perſwade one to love againſt Nature; ſo he whom the excellency of the Law it ſelf cannot invite to Study it, will never be forced to it with the fiſt of Logick, or other perſuaſion: Wherefore 'tis now time to expoſe my ſelf to the Cenſure of the Reader, who always judges according to his Capacity or Affection; for which cauſe, if I were to chuſe my Reader, I could wiſh with *Caius Lucilius*, *Quod ea quæ Scribo, neque ab indoctiſſimis, neque a doctiſſimis legi, quod alteri nihil intelligerent, alteri plus fortaſſe, quam ipſe de ſe:* That this Treatiſe might not be read of the moſt learned, nor of thoſe who are not learned at all, becauſe theſe underſtand nothing, and the others more perhaps than my ſelf.

Bracton, Lib. 1. Fol. 1.

However, I put this Requeſt to all, *Ut ſi quid ſuperfluum, vel perperam poſitum in hoc opere interveneriit, illud corrigant, & emendent, vel Conniventibus oculis pertranſeant: Cum omnia habere in memoria, & in nullo peccare, divinum ſit, potius quam humanum*: That if any thing be ſuperfluous, and placed amiſs in this Work, That they will either correct and amend it, or without carping connive at it; ſince to remember to do all things right and nothing amiſs, is rather the part of a God than Man: Wherefore, let him which never offended, caſt the firſt ſtone.

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The Antiquity and Excellency of Juries.

Tryals per Pais.

CAP. I.

The Derivation of the Word [Jury.] The Definition, Antiquity and Excellency of Juries.

JUrie (Jurata) cometh of the French word Jurer, i. e. Jurare.) And figni- fieth in Law, those twelve men who are sworn Judges in Matters of Fact, evidenced by Witnesses, and debated before them: I call them Judges, because, as 'tis the property of the Court, jus dicere; so 'tis in the power of the Jury to determine the Fact, upon an Evidence Pro and Con; according to those common Adagies, Ad quæstionem Juris respondent Judices; Ad quæstionem facti respondent Juratores; And as the Judgment of the Court ought to be guided by the Law, so is the Verdict of the Jury by the Evidence. They of the Jury are called Juratores, Jurors, a Jurando, as in ancient Laws Sacramentales a Sacramento præstando.

Vid. Cap. 12.

Vid. cap. 15.

The Antiquity and Excellency of Juries.

I need not here divide and shew the differences of Juries, nor the several sorts, they being so well known, viz. The Grand Jury, or Great Inquest, and Petty Jury, or Jury of Life and Death, in Criminal Causes, and in Civil Causes the Assize Jury. Inquest of Office, by some called Inquest of Jupyl and Inquest of Office, Something concerning each of these, will inadvertently be spoken of in what follows. As to the excellency of Juries, it appears from their Antiquity.

Sir Henry Spelman, verb. (Inquestio) says, Tryal by Juries was used in England, Normannis nondum ingressis, Leg. Ed. Confess. ca. 38. Postea inquisisset Justitia, i. e. (Justitiarius) per Lagamannos, i.e. (legales homines) & per meliores homines de Burgo, vel de Villa, vel de Hundredo, ubi mansisset Emptor, &c.

As to Tryal by twelve Men, though Sir Daniel and Polydore Virgil deny it to be older than the Conquest, and the latter says there is no Religion in it, but in the number; yet he stands fairly corrected, by that Excellent and Learned Antiquary, Sir Camden p. 133. who says, Whereas Polydore Virgil writeth, That William the Conqueror first brought in the Tryal by twelve Men, there is nothing more untrue; for it is most certain and apparent by the Laws of Edelred, that it was in use many years before, &c. And whereas Lamb. verb. (Centuria) says, In singulis Centuriis Comitia fiunto, atque liberæ Conditionis viri duodeni, ætate superiores, una cum præposito Sacra tenentes, jurento,

se adeo virum aliquem innocentem haud damnaturos, sontemve absoluturos, he refers to the Laws of Ethelred, cap. 4. cited by the learned Spelman, verb. (Jurata.)

And to the same doth my Lord Coke refer Com. super Lit. 155. and Preface to his third and eighth Report. And as to the Religion in the number of twelve, my Lord Coke gives instances ubi supra, and Sir Henry Spelman, in verb. (Jurata) supra, makes addition thereto.

So that I may truly say, Tryals by Juries have been used in this Nation, time out of mind, and were contemporary and coeval with the first Civil Government thereof and Administration of Justice; for amongst the first Inhabitants, the Britains, the Freeholders were used in all Tryals.

And Tryal by Juries was (as you see practised by the Saxons) continued by the Normans, and confirmed by Magna Charta. And was ever so esteemed and prized in this Island, that no Conquest, no change of Government ever prevailed to alter it.

'Tis true, Tryals by Juries before the time of H. 2. were not so frequent, because Sadæ or Purgationes, Ordalia, Tryals by hot Iron, hot Water, cold Water, Duels, and other superstitious ways were then in use; but Tryals by Juries were here in the Saxons time, and were found here, and not brought in by William the Conqueror from Normandy; nay, rather setled by Edward the Confessor in Normandy, where he a long time was, and taught many Laws, as you

may see in the Book of the Customs of Normandy.

Glanvil lib. 2. cap. 7. says, Ex æquitate autem maxima prodita est legalis ista institutio, speaking of these Tryals in opposition to Duels, &c.

The use of Juries.

Their general use (being the only Tryers of Choses in fait, almost in all Courts throughout England,) speaks them a publick good. To be Tryed by ones Peers is the greatest privilege a Subject can wish for; and so excellent is the constitution of the Government of this Kingdom, that no Subject shall be Tryed but by his Peers. The Lords by theirs, the Commons by theirs which is the Fortress and Bulwark of their Lives, Liberties and Estates; and if the good of the Subject be the good of the King, as most certainly it is, then those are Enemies to the good of the King and State, who attempt to alter or invade this Fundamental Principle, in the Administration of the Justice of this Realm, by which the King's Prerogative has flourished, and the just Liberties of the People have been secured so many Ages.

And what answer shall I make to the Pyrrhonists, vehementer admiror, videlicet, Wherefore are not Juries used in other Countries, if they are so good? but that of Fortescue, the Learned, who best could tell, scil. That other Countries can scarce produce one Jury so well accomplished with Wealth and Ingeny, as one County, nay, one Hundred can in England.

Fortescue. ca. 29.

But

But not to dwell in the Porch, I will addreſs my ſelf to the Gravity of the Law, where you muſt not ſo much expect the flaſh of Rhetorick as the light of Reaſon; no, the Law knows beſt how to expreſs her ſelf in her own Terms; wherefore all other Sciences muſt learn, with reverence, to keep their diſtance, and, as (as the Golden Finch ſings) be glad to have their ſparks taken up in her Aſhes.

Things, not Words, moſt regarded in the Law.

Finch. c. 3.

And ſince an Iſſue is previous, and the matter of a Tryal, I ſhall firſt give you the deſcription thereof, and then touch upon the ſeveral Tryals allowed by the Law, for the diſcuſſion of the truth.

CAP II.

Of an Iſſue, and the divers ſorts of Tryals thereof; and when a Tryal ſhall be by a Jury, and when not; when by Certificate, when by the Spiritual Law, when by Battail, and when by an Almanack; when Iſſue ſhall be firſt tryed *per Pais*; what ſhall be tryed by the Court; and what by Examination of the Attorny, Sheriff, &c.

1 Inſt. f. 126. *Omnia unum aliquem ſortiuntur exitum, vel per patriam, vel per Judices terminandum.* *Finch.* Epiſtle.

Tryals.

Iſſue, exitus, ſaith Coke, is a ſingle, certain and matereal point, iſſuing out of the Allegations and Pleas of the Plaintiff and Defendant, conſiſting regularly upon an Affirmative and Negative, to be tryed by Twelve Men: And it is two-fold, ſcil. either ſpecial, as where the ſpecial matter is pleaded; or general, as in Treſpaſs Not guilty: In Aſſize, nul tort, nul diſſeiſin, &c. And as an Iſſue natural cometh of two ſeveral perſons, ſo an Iſſue legal, iſſueth out of two ſeveral Allegations of adverſe parties.

And to give you likewiſe his definition of Tryal, It is to find out, by due examination, the truth of the point in iſſue, or queſtion between the parties, whereupon Judg-

Judgment may be given: and if the question between the Parties is matter of fact, then is the Tryal thereof; For either it is *quæstio juris*, (and then shall be tryed by the Judges, either upon a Demurrer, Special Verdict or Exception: For, *Cuilibet in sua arte perito est credendum*, & quod quisque novit, in hoc se exerceat.) Or it is *quæstio facti*. And the tryal of the fact is the Jurors sayth: First, chiefly, and most commonly, by a Jury of twelve Men, (of which kind of tryals, my intention is principally to treat in this Book.)

Note, That upon a Demurrer touret, and Issue to part, though it is the best way to give Judgment upon the *quæstio juris* first, yet the Court may try the *quæstio facti* first, at their discretion.

1 *Inst.* 72. 125.

Lamb. 4. Rolls tit. Tryals, 626. 723.

For by twelve Men are matters of Fact (for the most part) tryed both in England, in Causes both Criminal and Civil; in Causes Civil, after both Parties have said what they can, one against another, in Pleading; if there arise a question about any matter of Fact, it is referred to twelve indifferent Men, to be Impannelled by the Sheriff, and as they bring in their Verdict so Judgment passeth. And this the Judge is to declare as the Law is upon the Fact found: For the Judge sayth, the Jury finds thus, and then the Law is thus, and so the Judge. For the Law arises upon the Fact.

Proceedings in Civil Causes.

For Criminal Causes, the course is thus: At the Kings-Bench for Middlesex, and at the great and general Assizes, and at the general Sessions of the Peace, there is one Jury called the Grand Jury, which consists commonly of twenty four substantial Men, out

Proceedings in Criminal Causes.

of every Hundred within the County returned by the Sheriff, and they are to consider of all Bills of Indictment presented to them, which they either approve of by writing Billa vera, or disapprove, by writing upon them Ignoramus: and those which they approve of are to be tryed by another Jury called the Petit-Jury. Or the Grand-Jury may charge any person upon their own Presentment, which will be of the force of an Indictment, and the Party charged may Traverse the Offence, and bring it to be tryed by a Petit-Jury.

Some lesser Matters in these Courts are proceeded upon without a Jury, and some things are removed by Certiorari into higher Courts, and then must be tryed there; and that thing to which there is a Traverse put in, must be tryed and ended by a Petit-Jury, which (for the most part) in all Civil and Criminal Causes are but twelve Men, which ought to be Free-Men, not Villains or Aliens, and lawful Men, not Outlawed, and also Men of worth and honesty.

Proceedings in Civil Causes.

But because it is necessary to be known, that there are many ways allowed by the Common-Law to try matters of fact, besides this by Juries, I will here repeat some of them: And for this first hear the Oracle, who tells you, that he had read of six kinds of Certificates allowed for Tryals by the Common-Law.

1 Inst. 74.

Tryals by Certificate.

1. The doing of Services by him that holdeth by Escuage in Scotland, was to be tryed by the King's Marshal of the Army.

Per

Person Certificate en escript south son seal que serra mis a Justices, saith Littleton.

2. If it be alledged in abatement of an Outlawry, that the Defendant was in Prison at Burdeaux, in the [illegible] of the Mayor of Burdeaux, it shall be tryed by the Certificate of the Mayor of Burdeaux. Note, this was when Burdeaux was parcel of the Dominions of the King of England. Rolls tit. Tryal, f. 583.

3. For matters within the Realm, the Custom of London shall be certified by the Mayor and Aldermen by the mouth of the Recorder. vide apres 17.

4. By the Certificate of the Sheriff, upon a Writ to him directed, in case of Priviledge, if one be a Citizen or Foreigner.

5. Tryal of Records by Certificate of the Judges, in whose Custody they are by Law. All these be in temporal Causes.

6. In Causes Ecclesiastical, as Loyalty of Marriage, general Bastardy, Excommengement, Profession: These and the like, are regularly to be tryed by the Certificate of the Ordinary, vide apres 16.

If the Defendant claim his Priviledge as a Scholar of the University of Oxon, of such a College or Hall: this shall not be tryed by Certificate, but per pais. Rolls tit. Tryal. 583.

Concerning Certificates of Spiritual Persons, vide Rolls ibid. 591, 592.

7. A

Records.

7. A Record shall be tryed by the Record it self, and not per Pais. But matter of fact concerning a Record is tryable by a Jury, as whether a Plaint, &c. was levied according to the Custom; & non prosecutus est ullum breve, is tryable by the Country. Hob. 244. Hutt. 20 So if a Statute hath two Seals, or but one, Mo. con. 229. 2 Cro. 375. 1 Inst. 125. b. So in a per que servitia, if the Tenant say he held not of the Conusor jour del note levie, shall be tryed per pais.

Mixt with fact.

Rolls tit. Tryal. 574.

In Escape upon a Cepi returned, ne unques in son gard, shall be tryed per Record; but upon a Capias not returned, the pluis shall be tryed per pais. So shall an Action brought by Covin, for the Covin, is not of Record. In a scire facias per Roy to have execution of a Judgment in a Quare impedit, if the Defendant say, That after the Recovery the King presented, & issint Judgment execute, and the issue be whether the King presented, per cause del Judgment, or of an avoidance after the death of J. S. who was presented by a stranger after the avoidance, upon which the King had Judgment; this shall be tryed per pais And for this reason, in pleading of Letters, Patents, the place need not be alleged where the Letters Patents were made, because the Defendant cannot plead nul tiel Record, but must plead, non concessit, and then the Jury shall come from the place where the Lands lie, Vide li. 6. f. 15. 1 Inst. 117, 260. Plo. Com. 231. But upon a Non est factum pleaded to a Deed, there must be a place alleged where the Deed was made, because though the Deed, as to the matter of Law, be

Why there needs no *vifne*, where Letters Patents were made; otherwise in pleading Deeds. 4 Rep. 71.

be tryable by the Court, yet) the ſealing and delivery thereof, and other matters of Fact muſt be tryed by the Jury; ſo that in this Caſe of a Deed, there is a Tryal per Pais, and by the Court. 1 Inſt. f. 35. Vide apres 18. Deed.

The iſſue upon an Indictment or Acquittal upon this ſhall be tryed by the Record. So ſhall the allowance of a Protection in Bank. The Impriſonment upon the Execution, and not for other cauſe, in eſcape. The juſtification of an Impriſonment, becauſe he is a Juſtice of Peace. A Statute-Merchant, Count or not Count, Baron of the Parliament, or Vicount or not. Whether a place be within the Legeance of the King of England, or in Scotland. A Fine for releaſe rendring his Body in diſcharge of his Bail, ſhall be tryed by the Record. Rolls tit. Tryal 574. What iſſues ſhall be tryed *per Record.*

But in Eſcape againſt th Mayor of a Staple for ſuffering J. S. in Execution upon a Statute Staple to go at large, if the Defendant ſay he was not in Priſon upon the Execution, but upon a Plaint there, this ſhall be tryed per Pais and not per Record, becauſe 'twould be unreaſonable that the Defendant ſhould certifie a Record, where he himſelf was concerned. ibid. The time of inrolling Letters Patents ſhall be tryed per pais. Co. Lib. 4. 71. 9 H. 7. 2. What *per Pais.*

Siſſeiſin of an Office in any Court, or raſing a Record in any Court, by the Filizers and Attornies of the Court. Office raſing a Record.

Peers. The Lords may command a Jury to be Impannelled to try misdemeanors.

8. A Peer of the Realm, i. e. a Lord of the Parliament shall upon an Indictment of Treason or Felony, misprision of Treason, and misprision of Felony, be tryed by his Peers, without Oath, 1 H. 4. 2. But in Appeal at the Suit of the Party, he shall be tryed per probos & legales homines Juratores. 10 E. 4. 6. &c. because that is not the King's Suit, but the Parties. Vide lib. 9. 31. Le case del Abbot de Strata Marcella. And in a Præmunire, his Tryal shall be per Pais. Bolstr. 1 part. 198. Dutchesses, Countesses, or Baronesses, although Married, shall be tryed as Peers of the Realm are, but so shall not Bishops and Abbots. Stam. 153. 20 H. 6. 9. 2 Inst. 48, 49, 50. 156. b. 294. 2 Inst. 30. But Bishops shall be tryed by the Peers in Parliament.

12 Rep. 93. Lamb. In. f. 520. 3 Inst. 30.

Customs of Courts, &c. tryed by the Judges.

9. The Customs and Usages of every Court shall be tryed by the Judges of the same Court, if they are pleaded in the same Court, ibid. and many other things are tryed by the Judges, as the reasonableness of a Fine of an Offender, or upon Surrender of a Copy-hold Estate; and so it is of Customs, Services, and also of the time that a Tenant at will shall have to carry away his Goods; and these Cases come under the Rule which makes matter of Law to be tryed by the Judges; vide 1 Inst. 6. 74. And in some Cases matter of Fact shall be tryed by the Judges, as if the Plaintiff appear by Attorny in Court, and then the Defendant pleads that the Plaintiff is dead: If one appears, and saith he is the Plaintiff, whether he is or not, shall be tryed by

the

the Judges lib. 9. 30. So the Non-age of an Infant, generally by inſpection of the Court. Inſpection.

But in many Caſes Infancy ſhall be tryed per Pais, as if an Infant appear by Attorny, in Error, this ſhall be tryed per Pais, li. 9. 31. and ſo it is in an Ætate probanda. V. Bulſt. 1 par. 131. Rolls Tit. Tryals 571.

Maihem, In an Appeal of Maihem the Court may adjudge this upon the View, at the prayer of the Defendant, and this Tryal is peremptory to the Parties, by a Jury of Chirurgeons. Vide Rolls Tit. Tryals 578. Maihem.

Maihem may be tryed again be the Court, by inſpection for increaſe of Damages, but then theſe things are to be conſidered, Firſt, It muſt be a Maihem, and not a bare Wounding. Secondly, The Maihem muſt be aſcertained in the Declaration, ſo as that it may appear that the Maihem inſpected, and the Maihem in the Declaration be all one, as was reſolved, Mich. 21. Car. 2. B. R. in the Caſe of Badwel and Burford, the principal Caſe of which was, That the Defendant whip'd the Plaintiffs Horſe, which made him throw her, and another Horſe trod on her, and maim'd her Hand, and adjudged no increaſe of Damages in that Caſe, being a conſequential, and not a direct Maihem. Maihem.

Non-age in a Writ of Error to reverſe a Judgment or a Fine of the Tenant by reſceit of one vouched come deins age, & iſſint praie le parol a demurrer, Non-age ſur lid praier en Appeal, Audita Querela, to avoid a Statute, Recognizance, Accompt, and in all Actions where 'tis prayed that the parol de- Tryal by Inſpection becauſe of Record.

demurroit, Non-age shall be tryed per Inspection. But in Accompt against one of full Age, if he plead Non-age when he was Bayly, this cannot be tryed by Inspection, Rolls tit. Tryals 572. how this Tryal by Inspection shall be, vide Rolls ibid. at large.

In all Cases where the matter may be tryed by Inspection, Examination or Discretion of the Justices, if they doubt the matter, they may refuse to try this, and compel the Parties to a Tryal per Pais, or other proofs, 21 H. 7. 40. per touts Justices.

Tryals by Witnesses and Proofs.

10. There are many Tryals allowed by the Common Law, by Witnesses only, without a Jury, as of the life and death of the Husband in Dower, so the proof of a Summons, or the Challenge of a Juror, must be tryed by Witnesses; and regularly, the proof ought to be by two or three Witnesses, 1 Inst. 6. and divers other things must be tryed by examination of the Parties and Witnesses, as the Tryal by Wager of Law, &c. Finch 423.

V. 4 Inst. 278.

Glanvil lib. 13. cap. 18.

Non-age was antiently tryed by the Verdict of eight Men, but now by Inspection, and full age by twelve Men.

Appeal.

In an Appeal by a Feme of the death of her Husband, if the Defendant say that the Baron is alive in another County, or generally, that he is alive, this shall be tryed by proofs, 41 Assise 5. Vide Rolls Tit. Tryals 577. what shall be tryed by proofs in an Assise, and what not.

In a Writ of Annuity if the Defendant say the Party is dead in Britain, this shall be tryed by proofs, 26 E. 3. 70. Annuity.

11. Duke or no Duke, Earl or no Earl, Baron or no Baron, shall be tryed by the Kings Writ, lib. 5. 35. lib. 6. 53. But Dutchess or no Dutchess, &c. by Marriage, shall be tryed per Pais, because the Marriage is matter of fact. Dukes, &c.

12. In a Plea del alien nee, the League between the King and the Sovereign of the Alien, shall be tryed by the Record of the Chancery, for every League is of Record, lib. 9. 32. League.

13. If a Mannor be antient demesn, or not, it shall be tryed by the Book of Doomesday, which is in the Exchequer. But where certain Acres be parcel of such a Mannor, or no, it shall be tryed by the Country, ib. Mannor.

14. The Proceedings of a Court which is not of Record (as the County Court, the Hundred Court, the Court Baron, &c.) shall be tryed by the Country, and not by the Rolls of the Court, because they are no Record ib. Co. Lit. 117. b. Courts not of Record.

14. The Priviledges and Liberties of Courts of Record, Cities and Boroughs must be tryed by their Charters and Records. By Charters and Records.

15. Whether the Ordinary committed Administration to the Plaintiff, or whether the Testament was proved before the Ordinary, or whether such a Will be the Will of the Party, or whether he died Intestate, or not: in all these Cases the Tryal shall be per Pais, because probate of Wills, and constituting Wills and Administrations.

tuting Administrators, did not belong to Ecclesiastical Judges originally, but were given to them of late. But Tryal thereof is left to the Common Law, and was not given to them, lib. 9. 32, 40.

An Executor brings an Action of Debt, the Defendant pleads that the Testator never made him Executor, if the Plaintiff gives in Evidence the Probate of the Will, the Defendant shall only give evidence in disaffirmance of the Plaintiff's Probate, which is mater of Fact; but as to matter of Law the Court gives credit thereto, as where another Will was made, for there the Parties might have appealed; but if the Seal be counterfeit, or the Probate forged, its tryable per Jury, Adj. Pasch. 20 Car. 2. B.R. Noel and Wells. vide Wentworth's Executor 69.

Criminal Matters.

The Tryal of all Criminal Matters is by the Country, and the Party accused cannot be denyed it, unless it be his own fault, as where he is mute, and will not put himself upon his Country in due time, for then without farther Tryal Judgment de pain fort & dure is passed by the Judges upon him, Stamf. Pl. Coron. 150.

Plo. Com. 267. Special Bastardy.

16. In an Action upon the Case for calling one Bastard, the Defendant justified that the Plaintiff was a Bastard; And it was awarded that this should be tryed per Pais, and not by the Ordinary, Hob. 179. Devant 6. And so a Plea that the Plaintiff was born at such a place before Marriage, this is special Bastardy, and shall be tryed per Pais. Plow. 14. Dyer 89. vide hic cap. 29.

17. When

17. When an Iſſue is taken, whether a Cuſtom or no Cuſtom in London, If the Mayor, Commonalty and Citizens be Parties, or intereſſed in the Action, This Cuſtom ſhall be tryed by a Jury, and not by the Certificate of the Mayor and Aldermen, by the Recorder, Hob. 85. Day and Savadges Caſe. Devant. 3. Stiles 137. Moor 871. vide apres tit. Viſne. Roll tit. Tryal 579, 580. Cuſtoms of *London.*

The Cuſtom of London ſhall be certified by the Mayor and Aldermen, by the mouth of the Recorder, Co. Lit. 74.

In an Information upon the Statute 5 Eliz. for uſing a Trade, to which the Defendant was not bound Apprentice, If the Defendant plead a Cuſtom of the City, That he who is free of one Trade, may uſe any other; this ſhall be tryed by the mouth of the Recorder.

Note this difference, He that is free of one Manual Trade cannot uſe another Manual Trade: but it is otherwiſe of thoſe Trades which are not Manual. In ſuch, one that is free of one, may uſe another by the Cuſtom.

Liberties claimed by Cuſtom in London, the Cuſtom of making Indentures of Apprenticeſhip void, if not Inrolled within a Year; The Cuſtom to deviſe Lands, Foreign Attachment, &c. ſhall be tryed by the mouth of the Recorder, But the Iſſue whether there be a Market every Day of the Week in London ſhall be tryed per Pais, becauſe the Iſſue is not upon the Cuſtom, Rolls tit. Tryals 580. vide hic cap. 8.

Matter of Record mixt with matter of Fact.

18. A matter of Record being mixt with a matter of Fact, shall be tryed per Pais, and not by the Record, Hob. 244. Peter and Staffords Case, Devant 7.

Tryals by Battel. Writ of Right

19. In Writs of Right, and Appeals that touch Life, Tryal may be by Battel, or by Jury, at the Defendants choice; The Battel, in a Writ of Right, must be by Champions, (who must be Freemen,) But in an Appeal, it must be in proper Person. The Champions, in a Writ of Right are not bound to fight longer than until the Stars appear; and if the Champion of the Tenant can defend himself until then, the Tenant shall prevail: The Judges of the Court of Common Pleas, are Judges of the Battel, in a Writ of Right: and the Judges of the King's Bench in an Appeal of Felony. It seems they seldom or never killed one another in this tryal of Battel, for their Weapons were but Batoons, and he that was vanquished, was presently upon Proclamation made to acknowledge his fault in the Audience of the People, or else to cry Cravant in the name of Recreantise, &c. and upon this Judgment was to be given, and after this the Recreant should amittere liberam legem, that is, should become infamous, &c. 2 Inst. 247. Finch. 421. lib. 9. 31. Mirror of Justice 161, 162. &c. 1 Inst. 294.

Grand Assize.

Glanvil saith, The Tryal by Grand Assize came by the Clemency of the Prince. Est autem (saith he) Magna Assisa Regale quoddam beneficium, Clementia Principis, de consilio Procerum populis indultum.

For

For the Tryal of Treason, Murther and Felony as well upon Appeals, as upon Indictments, see Stamf. Pleas of the Crown.

By Glanvil cap. 1. lib. 14. it appeareth the Tryal of these Crimes by the old Law was this; If there were no direct Proof, nor Accuser, or if there was any Accuser, or direct Proof, yet if the Party denied the same, then the Tryal was by Wager of Battel, if the Party accused was not fifty years old, and of sound Limbs; but if he was older, or not sound, then he was to be tryed per judicium Dei, namely, per calidum ferrum vel aquam, that is, if he was a Freeholder, he was to run bare foot and bare legg'd over a row of hot Iron Bars, and if he passed three times without stop or fall, he was acquitted. And if he was a meaner Person, called Rusticus, he was to run through Vessels filled with scalding Water. Per judicium Dei.

20. In a Writ of Disceit, upon a Recovery by default, the Tryal shall be, if the Judgment was given upon the Petit Cape, by the Summoners; if upon the Grand Cape, by the Summoners pernors or veiors, and not per Pais: So if a Recovery by default in a real Action be pleaded, to which the other saith, Nient comprise, this shall not be tryed per Pais, but by the Summoners and Veiors, lib. 9. 32. Recovery by de fault. Summoners, pernors, veiors. Nient Comprise.

En Assise if the Issue be, whether the Land was extended in an Elegit, &c. This shall be tryed by the Extendors joyned with the Assise, 31 Ass. 6. vide Rolls tit. Tryal 581. 582.

Escheator, Sheriff.

Of Tryals per l'Escheator, per Examination, vide ib.

In an Appeal, if the Exigent be awarded, and the Party pray a Writ to inquire of the Goods and Chattels, and to seise them, this may be awarded to the Escheator, or Sheriff at the Election of the Court, 41 Ass. 13. vide hic cap. 24, 27.

Wager of Law.

21. In Debt upon a simple Contract, Detinue, &c. The Tryal may be by Wager of Law, or per Pais, at the Defendant's Election. But when the Defendant wageth his Law, he ought to bring with him Electors of his Neighbours, who will avow upon their Oath, that in their Consciences he saith true, so as he himself must be sworn de fidelitate, and the eleven de credulitate. Ib. Finch 423. and 1 Inst. 295. you may read excellent Learning concering this Tryal.

Profession

22. If Profession be denyed, it shall be tryed by the Court Christian; But if the time of the Profession be in Issue, this shall be tryed by the Country, lib. 4. 71. So though an Inrollment, or other matter of Record cannot be tryed per Pais, yet the time when the Inrolment was made, may be tryed per Pais.

Inrolment.

Appearance.

So whether the Party appeared in such a Court, or on such a day, &c. shall be tryed per Pais, Cro. 3 part, 131.

Sheriff. Admission, &c. Plenarty.

So whether one was Sheriff such a day or not, Cro. 1 part, 421. Admission, Institution, Plenarty and Ability of the Parson shall be tryed by the Bishop. But Induction shall be tryed by the Country, and so shall Avoydance by resignation, Dyer 229.

Moor

Moor 61. And void, or not void shall be tryed per Pais, 1 Inst. 344. And Plenarty, if the Clerk be dead, Mirror of Justice 324. li. 6. 49. The cause of refusal of a Clerk by the Bishop shall be tryed by the Metropolitan, if the Clerk be living; but per Pais, if he be dead l. 5. 58.

Ability shall be tryed by the Ordinary, if the Clerk be alive, but if dead then per Pais, Institution, Resignation, full or not full; Profession, unless alledged in a Stranger. Prior removeable at will, or perpetual, general Bastardy, the Right of Espousals, Divorce, &c. shall be tryed by the Bishops: but in many cases these matters being mixed with other circumstances, shall be tryed per Pais.

Per spiritual Law. *Vi. hic cap.* 16.

As if the Church be void by Resignation, or void or not void, Induction, Institution and Induction together, because the Common Law shall be preferred; Prior or not Prior.

Per Pais. For although Institution, Resignation. *&c.* are Spiritual, yet Avoidance,

Induction, *&c.* are notorious to the Country.

Bastardy, alledged in a Stranger to the Writ, or in one dead, or Abatement of the Writ. Whether a Feme be a Feme Covert in Possession, &c. in Trespas by Baron and Feme, Nient son feme shall be tryed per Pais. And see in Rolls tit. Tryal 584. &c. Many Cases where Bastardy, Marriage, &c. shall be tryed per Ley Spiritual, or per Pais. The time, &c. of Consecration of a Bishop,

Nota, Marriage of a Wife in Possession shall be tryed *per Pais*, but not the right of Marriage, as *ne unques accouple in loyal Matrimony*; this Right must be tryed by the Case.

Bishops Certificate, *Leon.* fol. 53. *Leigh* and *Hanmers*

and of other Spiritual Matters, shall be tryed per Pais. By what Spiritual Person the Tryal shall be, and for what cause, vide ib.

Ideot. 23. An Ideot found so from his Nativity by Office, may come in Person in the Chancery, before the Chancellor, and may that before him, and such Justices or Sages of the Law which he shall call to him (who are called the Council of the King) he may be examined whether he be an Ideot or no; or by his Friends he may sue a Writ out of Chancery, returnable there, to bring him into the Chancery, ibid. coram nobis, & concilio nostro examinand. lib. 9. 31.

Sheriff. 24. If it be in question, whether the Sheriff made such a return or not, It shall be tryed by the Sheriff: If whether the Under-sheriff made such a Return or not, it shall be tryed by the Under-sheriff; If the question be, whether such a one be Sheriff or not, he is made by Letters Patents of Record, and therefore it shall be tryed by the Record, ib. Cro. 1 part 421.

Dures. 25. If an Approver say, that he commenced his Appeal before the Coroner per dures, this shall be tryed by the Record of the Coroner; and if it be found that he did it without dures, he shall be hanged, ib. Corone br. 75.

Statute. 26. The Tryal, whether a Statute shewed before, be the true Statute or not, shall be by the examination of the Mayor and Clerk of the Statutes, which took the Statute, and not per Pais, ib. Whether a Statute hath two Seals or not, shall be tryed per Pais, Leon. 228, 229.

27. In

27. In Assise the Tenant said, that the Lands were taken into the King's Hands, this shall be tryed by the Examination of the Escheator. Escheator.

28. If one in avoidance of an Outlawry, alledge that he was in Prison at Burdeaux, ultra mare in servitio Majoris de Burdeaux, this shall be tryed by the Mayor's Certificate; and in such like Cases, other Tryals shall be by the Certificate of the Marshal of the Host, and by the Captain of Calice, and also by Messenger, of a thing done beyond Sea, ib. Certificate. Messenger.

29. At the Petit Cape, the Tenant said that he was imprisoned three days before the default, and three days after, this shall be tryed by the Examination of the Attorny; Nient Attach, per 15 Jours in Assize shall not be tryed per Pais, but by Examination of the Baily, ib. Petit Cape. Baily.

30. It seems an Almanack is so infallible, that it hath countervailed the Verdict of a Jury. For in Error of a Judgment given in Lynne, the Error assigned was, That the Judgment was given at a Court held there on the 16th day of February, 26 Eliz. and that this day was Sunday, and it was so found by Examination of the Almanacks of that year: upon which it was ruled, that this Examination was a sufficient Tryal, and that a Tryal per Pais was not necessary, although it were an Error in Fact; and so the Judgment was reversed, Cro. 3 part, fol. 227. 1 Leon. 242. the same Case, and there it was said, it was twice so ruled before. Almanack.

Ordeal.

31. In ancient times there was a Tryal in Criminal Causes called Ordalium, for upon Not Guilty pleaded, the Defendant might put himself upon God and the Country (as is the use at this day) or else upon God only; and then if he was a Freeman, he was to be tryed per ignem, that is, he was to pass over Novem vomeres ignitos nudis pedibus, and if he was not hurt by this, then he was to be acquitted, otherwise condemned; and this was called Judicium Dei; But if he was a Slave, then his Tryal was to be per aquam, and that divers ways, which all appear in Lambard, verbo Ordalium. From which kind of Tryal I presume we still retain this Expression of an innocent Person, That he need not fear fire or water: this manner of Tryal was first prohibited by the Canons, then be Parliament: The Tryal by Battel is likewise prohibited by the Canons, but not by Parliament, as you may read in the ninth Report, fol. 32. and in the Authorities there cited, which I therefore omit to recite here, (though I have the Books by me) and so in this whole Treatise, where I refer you to a Book, I shall not set down the Authorities cited in that Book, which will avoid prolixity.

Battle.

Which Tryal shall be first.

32. When the matter alledged extendeth to a Place at the Common Law, and a Place within a Franchise, it shall be tryed at the Common Law, 1 Inst. 125. 4 Inst. 221.

Tryal in one Issue binds in another.

In what Cases a Tryal in one Issue shall bind the same Party in another Issue, upon the same matter.

In

In Debt against two per several Præcipes. if one plead a release, and they are at issue upon the Deed, and the other plead the same Issue, if it be found the Deed of the Plaintiff in the former Issue, this shall bind him in the second Issue, 12 H. 4. 8.

In Trespass if the Defendant plead Villenage in the Plaintiff, if this be found against the Defendant, this shall bind him in the same Issue, in another Action in the same Court betwixt the same Parties, 44 Ass. 5.

If a Man be found guilty of a Conspiracy upon an Indictment at the King's Suit, this shall not bind in a Writ of Conspiracy at the Suit of the Party, but he may plead not guilty, 27 Ass. 13.

If a Man upon an Indictment of Extortion confess it and put himself in the King's Grace and makes Fine, &c. this shall bind him, and he shall not plead not guilty to the Suit of the Party, for a Confession is stronger than a Verdict, 27 Ass. 57. per Sharde, vide Rolls it. Tryal 625.

He which is not Party to the Issue nor can have attaint, or challenge the Inquest, shall not be bound by the Tryal, 11 H. 4. 30. In what Cases tryal against one shall be against others.

And therefore in Trespass against two, and one pleads a Release, and the other justifies as his Servant If the Issue be found against the Master, it shall not conclude the Servant, 11 H. 4. 30. Rolls ib. 625.

One shall not be compelled to try a Traverse the same Sessions he makes it, for a Man shall have time to make his defence, and is not supposed to be ready to answer sudden Objections, and for this reason many At what time the Tryal shall be.

Judg-

Judgments upon Indictments have been reversed.

Justices of Oyer and Terminer, nor Justices of Peace cannot inquire and determine the same day. But Justices of Gaol delivery, and Justices in Eyre may.

Justices of Peace cannot proceed to the delivery of a Person indicted of Felony before them the same day he is arraigned, 22 E. 4. Coron. 44. Declared by all the Justices of England, to be observed as a Law.

In an Indictment in B. R. or in the same County and removed thither, the Defendant may be arraigned and tryed the same day. For the King's Bench is a Court of Eyre for all Offences in that County. Otherwise of an Indictment removed out of another County, Vide Rolls tit. Tryal 626 many Cases de eo.

Marshal Affairs.

33. All Matters done out of the Realm of England, concerning War, Combat or Deeds of Arms, shall be tryed and determined before the Constable and Marshal of England, before whom the Tryal is by Witnesses, or by Combat, and their proceeding is according to the Civil Law, and not by the Oath of twelve Men, 1 Inst. 74. 261. Wherefore if the King's Subject be killed by another of his Subjects in any Foreign Country, the Wife or Heir of the Dead, may have an Appeal before the Constable and Marshal, who sentence upon the testimony of Witnesses or Combat, ib. So if a Man be wounded in France, and die thereof in England, ib. 4 Inst. 140.

Witnesses or Combat.

It is worthy our observation, to take notice when there are several Issues, which of them shall be first tryed; And for this you have already heard, that where Issue is joyned for part, and a Demurrer for the residue, the Court may direct the Tryal of the Issue, or judge the Demurrer first, at their pleasure, though by the Opinion of Dodrige, It is the best way to give Judgment upon the Demurrer first, because when the Issue comes afterwards to be tryed, the Jury may assess Damages for the whole.

What Issue shall be first tryed.

Latch. 4.

Damages.

A Scire facias was brought upon a Recognisance in Chancery, the Terre-tenants pleaded several Pleas, the Plaintiff demurred to one, and took Issue on the other, the Record was sent into B. R. to try the Issue, and it was tryed, and Verdict pro Plaintiff, the Demurrer not being argued, and it was adjudged per B.R. that Judgment ought to be given on both by that Court, Jeffreyson and Dawson's Case, Hill. 21. 22 Car. 2. B. R. vide for these things, 1 Rolls Abr. 534, 535. Rolls Rep. 287. and in the principal Case, 4 Inst. 80. was denied to be Law.

An Immaterial Issue joyned, which will not bring the matter in question to be tryed, is not helped after Verdict by the Statute of Jeofails, but there must be a Repleader; because this is matter of substance, for if there were no Issue, there could be no Verdict, and so it is as if nothing had been done in the Cause.

Immaterial Issue.

In an Action against two, the one pleads in abatement of the Writ, the other to the Action; the Plea to the Writ shall be first tryed,

Plea to the Writ.

tryed, for if that be found, all the whole Writ shall abate, and make an end of the Business; for the Plaintiff ought not to recover upon a false Writ, 1 Inst. 125.

Plea to the whole first tryed.

In a Plea personal against divers Defendants, the one Defendant pleads in Barto parcel, or which extendeth only to him that pleadeth it: And the other pleads a Plea which goeth to the whole: the Plea that goeth to the whole, (that is) to both Defendants shall be first tryed, because the other Defendant shall have advantage thereof; For in a personal Action the discharge of one is the discharge of both.

Release.

Rolls tit. Tryal 628.

As for example, If one of the Defendants in Trespass pleads a Release to himself (which in Law extends to both) and the other pleads not guilty (which extends but to himself,) or if one pleads a Plea which excuseth himself only, and the other pleads another Plea which goeth to the whole, the Plea which goeth to the whole shall be first tryed; for if that be found, it maketh an end of all; And the other Defendant shall take advantage hereof, because the discharge of one is the discharge of both. But in a Plea real it is otherwise, for every Tenant may lose his part of the Land; as if a Præcipe be brought as Heir to his Father against two, and one pleads a Plea which extendeth but to himself, and the other pleads a Plea which extends to both, as Bastardy in the Demandant, and it is found for him, yet the other Issue shall be tryed; for he shall not take advantage of the Plea of the other, because one

Discharge of one dischargeth both.

Joyn-

Joyntenant may lose his part by his misplea.

Brown and Stamford Justices consulted with Grammarians in things of Grammar; and Hulls a Batchelor of Law (tempore H.6.) was called into Court to shew the difference between precise and causative Compulsion, Vide Plow. 122, 127, 128.

Pasch. 16 Car. 2. B.R. An Action of Trover, &c. was brought de sex Capitalibus fibulatis, Anglice six laced Coifs; after Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Latin Words were both Adjective, and so not certain; but it was answered, that Capital is a Substantive, and the Nomenclator of Westminster School was produced to warrant it, and it was adjudged for the Plaintiff accordingly, and the Court allowed that authority before Rider's Dictionary.

CAP.

CAP. III.

Of a *Venire Facias*; to whom it shall be directed; when to the Sheriff, when to the Coroners, when to Esliors, and when to Bayliffs; when well awarded, &c.

HAving given you the Epitome of what Tryals are allowed by the Common Law, and what shall be tryed per Pais, and what not; we shall now apply our selves more particularly to the Tryal by Juries: And because a Venire facias is the foundation and Causa sine qua non, of a Jury (I mean in Civil Causes; for in Criminals, as upon Indictments, the Justices of Gaol-Delivery, give a general Command to the Sheriff, to cause the Country to come against their coming, and take the Pannels of the Sheriff, without any Process directed to him; yet Process may be made against the Jury, though it is not much used. Stamford Plees del Corone 155.) I will first recite the Writ in terminis, the rather because I intend to order my Discourse, according to the method of the Writ.

Venire facias

Rex, &c. Vic. B. Salutem. Præcipimus tibi quod venire facias coram Justiciariis nostris de Banco apud Westm. tali die, duodecim liberos & legales homines de vicinet. de C. quorum

quorum quilibet habeat quatuor libat. terr. tenement. vel reddit. per annum ad minus, per quos rei veritas melius scire potest; Et qui nec D. C. nec F. G. aliquo modo attingunt; ad faciend. quandam Jur. inter partes prædict. de placito, &c. quia tam idem D. quam prædict. F. inter quos talis contentio est, posuer. se in Jur. &c. Et habeas ibi nomina Jur. illorum & hoc breve. T. &c.

This is one of those Latine Letters, (as Finch terms them, f. 237.) which the King sends with salutation to the Sheriff; but withal commands him, that he cause to come twelve free and lawful Men of his County, to resolve the Question of the Fact, in dispute between the Parties upon the issue; and it is a Judicial Writ, issuing out of the Record, for Plaintiff or Defendant, after they have put themselves upon the Country: for upon the Words Et de hoc ponit se super patriam, by the Defendant; or, Et hoc petit quod inquiratur per patriam, by the Plaintiff, and issue joyned thereupon, the Court awardeth the Venire facias, viz. Ideo fiat inde Jurat.

Ideo venit inde Jurat. is Error in inferiour Courts, for it ought to be Ideo præcept. est vic. quod ven. fac. &c. Siderfin 364. and it should be de visneto de C. specially, Keeble 2 part 350.

And if they come not at the day of the Writ returned, then shall go forth against them, an Habeas Corpora and Distringas, to bring them in to try the matter. Which

which two last Writs are usually made with this Clause, Nisi prius Justiciarii venerint, &c. and are returnable after the time of the Justices coming their Circuit.

Sheriff. And first, you see it is directed Vicecomiti, i. e. to one who is Vicecomes, and hath the Jurisdiction of the County in stead of the Earl of that County, to whom once it did belong: as we are taught in the Mirror, cap. 1 sect. 3. fol. That it appeareth by the Ordinance of ancient Kings before the Conquest, That the Earls of the Counties had the Custody or Guard of the Counties. And when, the Earls left their Custody or Guards, then was the Custody of Counties committed to Viscounts, who therefore are called Vicecomites.

What trust in the Sheriff. What great Repose and Trust both the King and Laws put in this great Officer, the Oracle tells you, 1 Inst. 168. That he is Sheriff, that is, Præfectus Comitatus, Governour of the County; for the Words of his Patent be, Commisimus vobis Custodiam Comitatus nostri de, &c. And he hath a threefold Custody, triplicem Custodiam, viz. first, Vitæ Justiciæ, for no Suit begins, and no Process is served but by the Sheriff. And he is to return indifferent Juries for the Tryal of Mens Lives, Liberties, Lands, Goods, &c. Secondly, Vitæ Legis, he is after long Suits and chargable to make Execution, which is the Life and Soul of the Law. Thirdly, Vitæ Reipublicæ, he is Principalis Conservator pacis within the County, which is the Life of the Commonwealth, for Vita Reipublicæ Pax.

Yet

Yet notwithstanding the height and Latitude of this great Officers Power and Trust, the Law adjudges him in many cases not capable to do so much as return a Jury; for if he be of Kindred by nature, or of affinity by Marriage to any of the Parties, or (that I may say all in a little) if he be not as indifferent almost in all respects as he is whom the Law allows to be a Juror, he ought not to meddle with the returning of the Jury; But the Venire facias shall be directed to the Coroners (or to some of them, if the residue are not indifferent) who in that case are hac vice, Vicecom. And if the Coroners are not indifferent, then the Venire shall be directed Ad 2 Electores, that is, to two whom the Court shall chuse and deem fit to return the Jury; and to the return of these Elisors or Esliſors, ab Eligendo, no challenge will be admitted. Bro. tit. Venire facias 14. as to the Array, but to the Polles, 1 Inst. 158. If one of the Sheriffs of London be a Party, then the Venire may be directed to the other Sheriff; if the Under-Sheriff be a Party, yet the Venire may be directed to the Sheriff, with this Proviso, Quod Sub Vic. tuus in nullo se intromittat cum executione istius brevis. 18 E. 4. 3.

To whom the *Venire facias* ought to be directed.

Coroners.

Fortescue, cap. 2. 5.

Elliors.

Challenge.

Sheriff of *London.*

Of *London* or of any place, where two persons make one Sheriff

Judicial Writs (say Cook and Sanders Plo. 74.) may be directed to the Coroners, as the Venire facias, where the Parties are at issue; there, upon the surmise of the Plaintiff, that the Sheriff is his Cousin, and upon prayer that the Venire be directed to the Coroners, for avoydance of his own delay that might happen by the challenge of the Array,

Suggestion.

Of whom.

Coroners.

So in Ejectment against four upon Affinity of the Sheriff to one of the Defendants. Rolls tit. Tryal 668. Examination.

the Defendant shall be examined whether it be be true, or not, and if he confess it, then the Venire shall be awarded to the Coroners; for then it appears to the Court by the Defendants confession, that the Sheriff is not indifferent; but if the Defendant denies it, then the Process shall be awarded to the Sheriff, because the Sheriffs Authority and Profit shall not be taken away, without cause apparent to the Court; but if the Defendant will alledge any such matter, and pray a Venire facias to the Coroners, there the Plaintiff shall not be examined, neither shall such Allegations be allowed, because delays are for the Defendants advantage, and the Defendant may challenge the Jury for this cause, and so is at no prejudice.

Not of the Defendants Suggestion

The Defendant may not have a *Venire facias* to the Coroners.

And see in Term. Hill. 3 H. 7. f. 5. placit. ult. in a Quare Impedit, where the Defendant shewed how the Sheriff was Cousin to the Plaintiff, and prayed a Writ to the Coroners, but it was denied him upon the same reason. Fitz. tit. suggestion placit. 8. Br. Challenge 153.

In the Lord Brook's Case, Trin. 1657. B. R. In Ejectment, the Court was moved that the Lord Brooks might be made Ejector, which was granted; then the Court was informed that the Lessor of the Plaintiff was High-Sheriff of the County, and that the Coroner was Under-Sheriff, and it was prayed that Eilzors might return the Jury; but the Court would not grant it at the prayer of the Defendant, though the Plaintiff offered to agree to it, it being in a Tryal by Nisi prius; but hap it been in a Tryal at Bar,

War, they would have granted it. But the regular course is for the Plaintiff to pray it, or else the Defendant may challenge the Array at the Assises; for it is a principal challenge, that the Lessor of the Plaintiff is High-Sheriff, or of Kindred to the Sheriff, for which see Hutt. 25. More 470. Rolls Rep. 328. And it was so adjudged, Trin. 15 Car. 2. B. R. Duncomb and Ingleby, that it is a principal challenge.

In Ejectment, the Plaintiff suggested that he and one of the Coroners were all of the liberty del Countee Wigorn', and prayed a Venire facias to the other Coroner; although this is no principal challenge, and the Defendant might have opposed the prayer, yet because he confessed it, the Award was well to the Coroner. So if the cause be that one of the Coroners be retained of Counsel with the Plaintiff; If the suggestion do not comprehend a principal challenge, but only of favour, this is not sufficient to award Process to the Coroners: But if it be a principal challenge, as Affinity, &c. If the Defendant confess it, the award shall be to the Coroners; if he will not confess it, then to the Sheriff, and in such case the Defendant shall never challenge the Array for that cause: so if the Plaintiff pray process to the Coroners for favour in the Sheriff, if the Defendant say that this is not favourable, he shall never challenge for favour unless de pu sne temps.

For what causes Process shall be directed to the Coroners.

If the Array be quashed because made by the Sheriffs Minister, who was aiding and of Councel with one of the Parties, yet the Writ shall not be directed to the Coroners,

but to the Sheriff, commanding him to make the Pannel by another Officer. As, Ita quod the Sheriff ne se intromittat, &c.

Note, The Sheriff may appoint a general Officer in a Court, and his return shall be good. Keeble 1st Part, 357.

If the Tales be quashed for affinity in the Sheriff, but not the principal Pannel, because 'twas made before the affinity, yet all shall be awarded to the Coroners, Scil. the Distringas of the principal Pannel, and that they return a new Tales, for there shall be but one Officer if the Array be quashed, because made but by one of the Coroners, or for affinity in one, &c. Yet the Process shall still go to the Coroners, Ita quod the Coroner se non intromittat.

To whom Proces shall be directed for default in the Sheriff and Coroners.

If default be in the Sheriff and Coroners the Court may choose two Esliors, and if the Parties can say nothing against them, they shall make the Pannel.

But the Distringas shall not be directed to Esliers, for the Court cannot make Officers to distrain the Kings Liege People, but the King may. 8 H. 6. 12. dubitatur.

Proces may be directed to the Justices of Assise, by assent of Parties, not without.

When a Pannel is made by the Esliors, they shall afterwards serve all Proces that comes upon this, as the Sheriff should. 15 E. 4. 24. 18 E. 4. 3, 8. Rolls tit. Tryal 670. For it may be the Sheriff will distrain only those who are his Friends and be partial.

When the Process is once awarded to the Coroners, for a default in the Sheriff, if there be a new Sheriff made afterwards, who is in-

indifferent, yet the Proceſs ſhall not revert but continue to the Coroners pendant le plea. 14 H. 7. 31. Bro. tit. Venire facias 17. So the Entry is, Ita quod Vicecomes ſe non intromittat. 18 E. 4. 3. 18 H. 6. 12.

Venire facias once directed to the Coroners ſhall not be to the Sheriffafterwards.

And therefore where the Sheriff ought not to return the Venire, he cannot return the Tales. For in Error in the Exchequer Chamber of a Judgment in the Queens Bench, the Error aſſigned was becauſe the Venire facias was awarded to the Coroners, for conſanguinity in the Sheriff; and it was returned by the Coroner, and afterwards the Tales was awarded, and it was returned by the Sheriff, and it was tryed, and a Verdict given, and Judgment. And for this cauſe held to be Erroneous, and not aided by the Statute of 32 H. 8. or 18 Eliz. Wherefore the Judgment was Reverſed. Cro 3. par. 574. Bro. tit. Octo Tales 9.

Sheriff ſhall not return the *Tales*, where he cannot the *Venire facias*.

I will inſtance one Caſe more in the ſame Reports, f. 586. becauſe it is very full in the point. After iſſue in Treſpaſs, the Plaintiff for his expedition ſurmiſed, that he was Servant to the Sheriff, which being confeſſed by the Defendant, the Proceſs was awarded to the Coroners, and after Verdict, it was moved in Arreſt of Judgment, that the Tales de circumſtantibus was awarded, and returned by the Sheriff which was held by the whole Court to be good cauſe for ſtaying the Judgment; for it is a miſ-tryal, not aided by any of the Statutes, for Proceſs being once awarded to the Coroners, the Sheriff afterwards is not the Officer to return the Jury, no more than any other Man, and Proceſs

Where the Coroner returns the *Venire facias*, he ought to return the *Tales*

ought always to be returned by him, who is an Officer by Law to return it, otherwise it is meerly void. But afterwards upon view of the Record, it appeared that the Tales was returned by the Coroners, and their Names annexed thereto, wherefore it was without further question. But the Court said, if their Names had not been annexed to the Tales, yet it had been well enough; for they be annexed to the first Pannel, and it shall be intended that the right Officer return'd it; and the usual course is, That to such Tales there is not any Officers Name subscribed, and yet it is good enough; for it is not within the Statute of York, which appoints that the Name of the Sheriff should be subscribed, but it was moved that the Record of the Postea is, That the Tales were returned by the Sheriff; but the Court held, that it was amendable, and it was done accordingly, and the Plaintiff had Judgment.

No name to the Return.

Venire facias to the Sheriff, after one awarded to the Coroners.

But if the Venire be awarded to the Coroners, for default in the Sheriff, and they do nothing upon the Writ, then I suppose, upon a default discovered in the Coroner, de puisne temps, the Party may shew this to the Court, and have a Venire awarded to the Sheriff, (if there be an indifferent one made in the mean time) or else to Esliors, &c. sic e converso.

Venire facias to the Coroners, after one to the Sheriff.

In Error of a Judgment in Chester, the Parties being at issue, a Venire was awarded to the Sheriff, and at the day of the Return, it was entred Quod Vicecomes non misit breve. And then the Plaintiff prayed a Venire facias to the Coroners, for cozenage betwixt him

him and the Sheriff, which was awarded accordingly; and at the day of Tryal the Defendant made default, and thereupon Judgment Error was assigned, because that after the Plaintiff had admitted the Sheriff to execute the Writ, he could not pray a Venire facias to the Coroners, without some cause de puisne Temps, sed non allocatur, because there was nothing done upon the first Writ. And the Defendant having made default, it was not material. Cro. 3. part. 859.

No *Venire facias* to the Coroners, after one to the Sheriff.

But the Defendant might have demurred to this prayer; for if the Plaintiff pray a Venire facias to the Sheriff, he shall not challenge the Array, nor have a Venire afterwards to the Coroners, because the Sheriff is his Cousin, or for any other principal challenge, whereof he might by common intendment have conusance, when he so prayed the Venire facias; for upon shewing this cause at first, he might have prayed Process to the Coroners; but for a principal challenge, of which by common intendment the Plaintiff could not know at the first, as that the Defendant is of Kindred to the Sheriff, &c. he may afterwards challenge the Array, when they appear, or if the Sheriff doth nothing upon the Writ, he may pray a new Venire to the Coroners. 15 H. 7. 9.

If the Defendant denies the Plaintiffs suggestion, he shall have no benefit of it by Challenge.

If the Plaintiff prays a Venire facias to the Coroner, because he is of kindred to the Sheriff, if the Defendant will not confess this, but denies it, this shall be entred, and the Defendant shall not challenge the Array for this cause afterwards. Br. tit. Venire facias 21. and 23.

By consent, the *Venire facias* may be directed to a wrong Officer.

If a Venire facias be awarded to the Coroners where it ought to be to the Sheriff, or the Visne cometh out of a wrong place, yet if it be per assensum partium, and so entred of Record, it shall stand, for omnis consensus tollit errorem. 1 Inst. 126. li. 5. 36.

Mistrial without such consent.

But if it be directed to the Coroners, where it ought to be to the Sheriff, without such consent of parties, This is an insufficient Tryal, not remedied by any Statute, except it be upon an insufficient suggestion, and then the Statute of 21 Jac. c. 13. helps it.

Venire facias. to some of the Coroners.

Upon suggestion that the Plaintiff and the Sheriff, and one of the Coroners are of kindred to the Plaintiff or Defendant, or upon any other suggestion which contains a principal challenge, the Venire facias may be directed to the other Coroners. Dyer 367.

Bayliffs.

Error of a Judgment in Northampton, because in Northampton the Court being held before the Mayor and two Bayliffs, the Venire facias upon the Issue was awarded to the two Bayliffs to return a Jury, before the Mayor and Bayliffs, secundum consuetudiem, which being returned and Judgment given, the Error assigned was, because the Bayliffs being Judges of the Court, could not also be Officers to whom Process should be directed, there being no custom that can maintain any to be both Officer and Judge. But all the Court (absente Hyde) conceived it might be good by custom, and that it is not any Error, for the Judges be not the Bayliffs only, but the Mayor and Bayliffs; and it is a common course in many of the ancient Corporations, where the Bayliffs are Judges, or the Mayor and

Judge and Officer to return Writs.

and they be Judges; yet in respect of executing Process, they be Officers also; and one may be Judge and Officer diversis respectibus, as in Bedfordshire, the Sheriff is Judge and Officer: Whereupon Judgment was affirmed. Cro. 1. part. 138.

Venire facias. to the Garden of the Palace of *Westminster.* Rolls tit. Tryal 667.

In Trespass and Assault laid in the Court, to be at the Palace of Westminster; It was adjudged, that the Venire facias shall issue al Gardendel Palace, and not to the Sheriff of Middlesex. Bro. tit. Ven. fac. 31.

Award of *Venire facias.*

In Trespass against two, if one plead, and two issues are joyned upon his Plea, and two other issues are also joyned, and the Court award a Venire ad triandum exitum illum quam prædictum alium exitum inter the Plaintiff and the other Defendant, &c. This is a good award, although there be several issues betwixt the Plaintiff and both Defendants, because that this word Exitus may be for all, reddendo singula singulis. Hob. 91.

Proche in Hundred.

If an Inquest remain for default of Rapers, and a Decem Tales is awarded, and the Defendant saith for his deliverance that he is Lord of the Rape, where, &c. and that all there are within his Distress, and prays a Writ to the next Hundred; the Court may try this by Tryors presently, without a return of the Sheriff and if it be true may award to the next Hundred, otherwise if it be false. 3 H. 6. 39.

CAP.

CAP. IV.

What faults in the *Venire facias* shall vitiate the Tryal, what not. When a *Venire facias de novo*, shall be awarded; when several *Venire facias*'s. When the *Venire facias* shall be betwixt the Party and a Stranger to the Issue; who may have a *Venire facias* by *Proviso*, and when.

WE have now shewed you to what Officer the Venire facias shall be directed; The next step in the Writ is Præcipimus tibi quod Venire facias: which words Venire facias, are the most effectual words in the Writ, and therefore they give the denomination to the whole Writ: And here opportunity is offered us to speak something of a Venire facias in general. I am not ignorant how our Books swarm with Cases which arise from the defects in this Process, and how that Verdicts have been set aside, Judgments stayed and reversed, for want of sufficient Returns, misawarding, disagreement with the Rolls, discontinuance, and many other faults in this Writ. But the Statutes of Jeofails (especially the Statute 21 Jac. cap. 10.) have pardoned (as I may so say) these enormities; As, The awarding this Writ, Hab. Corpora, or Distringas to a wrong

Venire facias why the Writ so called.

Statute of *Jeofails* 21 *Jac.* 13.

wrong Officer, upon any insufficient suggestion, or by reason the Visne is in some part misawarded, or sued out of more places or fewer places than it ought to be, so as some place be right named: The misnaming of any of the Jury, either in Sir-name or additiron in any of the said Writs, or in any Return thereupon, so that upon examination it be proved to be the same Man that was meant to be returned; or if no Return be upon any of the said Writs, so as a Pannel of the Names of the Jurors be returned, or annexed to the said Writ; or if the Sheriff or Officers Name, having the Return thereof, is not set to the Return of any such Writ, so as upon examination it be proved that the said Writ was returned by the Sheriff or Under-Sheriff, or such other Officer. In all these Cases the Judgment shall not be staved, nor reversed for these defects.

But this Act doth not extend to any Writ, Declaration, or Suit of Appeal of Felony, or Murther, nor to any Indictment or Presentment of Felony or Murther, or Treason; nor to any Proces upon any of them; nor to any Writ, Bill, Action, or Information upon any popular or penal Statute; wherefore since Informations and popular Actions are grown so frequent, the Attornies, &c. herein had best beware of these Jeofails.

By this Statute many defects are remedied, which were not by the Statutes of 32 H. 8. cap. 30. and 18 Eliz. cap. 14. yet all are not; for this Act only helps the misnaming of a Juror in Sir-name, or addition and saith nothing of his Christian name: Popular Action, &c.

where

Christian name mistaken in the *Venire facias*, incurable.

wherefore I conceive the Law in Codwel's Case in the fifth Report, remains as it was then; which is, that if a Juror be mis-named in his Christian name, on the Venire, though he be named right in the Distringas and Postea, yet this is ill, and not amendable, and with this agrees Goddard's Case, Cro. 2. part 458.

Christian name right in the *Venire facias*, and wrong in the *Distringas*.

And since the Court (Cro. 1 part. f. 203.) doubted thereof, I may well put the Question; If a Juror be right named upon the Venire, and mis-named in his Christian Name in the Distringas. &c. whether this is amendable or not; without dispute it is not by the Statute of 21 Jac. for that only helps the Sir-Name. But with reverence to the Courts doubt, I conceive clearly, it is holpen by the Statutes of 32 H. 8. and 18 Eliz. as a discontinuance of Process; and I may with the more confidence believe it, because in Codwel's Case aforesaid, where in the Pannel of the Venire, a Juror was named Palus Cheale, and in the Distringas, &c. he was right named Paulus Cheale, and so because he was mis-named in his Christian Name in the Venire, Judgment was arrested. But it is there adjudged, that if he had been well named upon the Venire, and mis-named on the Distringas, or Postea, then upon examination it should be amended. But the Countels of Rutlands Case, Lib. 5. 42. is expels in the Point, and so is Cro. 3. part. 860. Rolls 196. Teppet in the Venire and Tipper in the Distringas, amended. And so if the mistake be in the Pannel Jurata, the Sheriff may come in Court, and amend it. And so

if

If Samuel be in the Venire and Distringas, and Daniel in the Nomina Juratorum, upon examination, this may be amended. And so if the Name be right in the Venire, and mistaken in the Christian Name in the Distringas or Postea, it is amendable. Rolls 197. And so if he be De A. in the Venire and Distringas, and De B. in the Nomina Juratorum, this is amendable.

And it is to be known, that in most Cases, where the Venire facias, Habeas Corpora, or Distringas be defective, they are to be amended; but if the malady be so fatal in the Venire, that it causes a mistryal, (as in the mistake of a Juror's Christian Name or where a Juror not returned is sworn, &c.) then the Verdict is to be set aside, and a Venire facias de novo, to be awarded, and so was it to be upon those mistakes, (now amendable by the Statutes) before the making thereof And where a Jury giveth a Verdict which is accepted and Recorded by the Court, be the Verdict perfect or imperfect, the Jurors are discharged, and shall never try the same issue again upon a new Nisi prius. But if the Verdict be so imperfect that Judgment cannot be given upon it, then the Court shall award a Venire facias de novo, to try the issue by other Jurors. Lib. 8. 65. Bulstr. 2 part 32.

Venire facias de novo.

One Jury shall not try a Cause twice.

If upon an issue all the matter be not fully enquired, a Venire facias de novo shall issue. 18 E. 3. 50.

Venire facias de novo.

In an Audita Querela, if the Parties go to issue upon payment according to the defeazance of the Statute, and this is found for the

the Plaintiff, but the Jury do not assess Damages, the Court shall award a Venire facias de novo, to assess Damages. 22 E. 3. 5. vide hic cap. 6. and Rolls tit. Tryal 593, 595.

If the Record of the Nisi prius be unum modum tritici for modium, and the Plaintiff is Nonsuit at the Assise, for this mistake, if the Record in Court be right, scil. Modium, this Nonsuit shall not be Recorded, but a Venire facias de novo shall be awarded. So for any other mistake, as if the Record in Court be Grays-Inn Lane, &c. and the Nisi prius, which is but a Transcript, be Graves-Inn Lane, &c. For this is a Nonsuit upon another Record than what is in Court.

In Battery against Three who plead Three several Pleas, and upon the Writ of Nisi prius, two issues are found for the Plaintiff, and Damages assessed; but nothing is found for the third issue, this is a mis-tryal, and a Venire facias de novo shall issue.

Detinue. In Detinue, if the Jury find Damages and Costs, but no value, as they ought, this shall not be supplied by a Writ of Inquiry of Damages, but a Venire facias de novo shall be granted. And so of other defects in finding the full issue.

Venire facias de novo. In a Quare Impedit if the issue be found for the Plaintiff, but by negligence, the Jury do not inquire of the four points, scil. de plenitudine, ex cujus præsentatione, si tempus semestre transierit, and the value of the Church per annum; This shall be supplied by a Writ

Writ of Inquiry, without a Venire facias de novo, because the Court ex officio ought to have charged the Jury with the four points of Inquiry, and if the Jury had found them, no Attaint lay; for as to this they were but as an Inquest of Office.

In a Writ of Annuity, if the issue be found for the Plaintiff, but the Jury do not assess Damages or Costs, this shall not be supplied by a Writ of Inquiry, but a Venire facias de novo shall be granted. Annuity.

In Ejectment against Baron and Feme, and the Jury find the Wife not guilty, and find a special Verdict as to the Husband, which special Verdict is afterwards adjudged insufficient by the Court, a Venire facias de novo shall be granted for both, as well the Wife as the Husband, and the Wife may be found guilty, because the Record and Issue is intire, and the Verdict is insufficient and void in tout. Ejectment.

So if there be several issues, and the Jury find some well and directly, and in others special Verdicts which are imperfect, a Venire facias de novo shall be granted for all, and the Jury may find contrary to their first finding. Imperfect Verdict.

In Trespass of Assault and Battery, and taking away of grain, and the Defendant as to the Battery justifies in defence of his grain, upon which the Plaintiff demurs, and as to the grain he pleads not guilty, which is found for the Plaintiff, and the Jury do not tax Damages for the Battery depending in Demurrer as they ought, in this Case, if the Demurrer be afterwards adjudged for the Plaintiff,

Plaintiff, yet the Damages for this cannot be afterwards supplied and cured by a Writ of Inquiry of Damages, but a Venire facias de novo shall issue to Tryal, because all is comprised in one Original. Vide apres cap. 13. and devant cap. 2.

Who shall grant it?

In a Scire facias upon a Recognisance in Chancery, if the Parties be at issue, upon which the Record is commanded into B. R. and there it appears that the Venire facias is not well awarded, the Venire facias de novo shall be awarded in the King's Bench, and not in the Chancery. Rolls tit. Tryal 723.

Album Breve, the County left out in a *Venire facias*.

In Yelverton's Reports, f. 64. The Case is, that a Venire facias was made Vicecomiti, leaving out Salop, for which there was a blank left in the Writ. But re vera, it was returned by the Sheriff of Salop. In Arrest of Judgment, it was alledged that the Venire facias was vitious for this cause; but Gawdy said it should be amended; and by Fenner and Williams, it is as no Writ, because it is not directed to any Officer. And then it is aided by the Statute of Jeofailes; for it might rather be called a Blank than a Writ, because it was directed to no Officer. If there be no return of the Sheriff indorsed upon the Venire facias, it was held not amendable. 35 Eliz. Lib. 5. 4. Otherwise of the Distringas, if that be Album breve, and no return, if the Venire facias be right. Rolls tit. 204.

In

In Cases where there are several Defendants, who plead several Pleas, the Plaintiff may chuse either to have one Venire facias for all, or several, for every one of the Defendants; but (if you will be rul'd by Stamford) the surest way is to have a Venire facias against every one, and then one cannot have benefit of the others challenge; neither shall the death of one abate the Venire facias against the other; (this he speaks of in Appeals) but if the Court will award a joynt Venire facias, you cannot have several Venires afterwards, though there be nothing done upon the first; except it be upon matter de puisne Temps, as the death of one of the Defendants, &c. Lib. 8, 66. Lib. 11. 5, 6. Stamf. 155. Bro. tit. Venire facias 2. 35.

Several *Venire facias.*

But now it is the usual course to have but one Venire facias upon several issues, though against several Defendants. Cro. 3. part. 866. Hob. 36. 64. And so usual, that the Court declared, Cro. 2. part. 550. That there never shall be several Venire facias to try several Issues in one County; for what need the Plaintiff trouble himself and the Country with several, when one Jury will serve his turn; Et frustra fit per plura quod fieri potest per pauciora. But otherwise, if it is to be in two Counties. Cro. 3. part. 866.

One *Venire facias* in several issues. Vide Rolls tit. Tryal 596. 620. 667. Hob. 88. 51.

After issue joyned by two Defendants, if one of them dye, and then a Venire facias is awarded betwixt the Plaintiff, and both the Defendants, and so in the Habeas Corpora and Distringas, yet this shall not vitiate

Venire facias between the Plaintiff and two Defendants where one is dead.

the Venire facias &c. to make Error; because, though one of the Defendants be dead, yet the other being alive it is sufficient. And there needs be no surmise in Judicial Writs, that one of the Defendants is dead; It is time enough to shew it to the Court at the day in bank. Cro. 1 part. 4. 26. But if there be two Defendants, and the Venire facias be but against one of them, 'tis Error. 7 H. 4. 13. and Bro. tit. Ven. fac. 11. Cro. 1 part. 426.

No surmise in Judicial Writs, of death in one of the Parties.

If the Venire facias bears date before the Action brought, or varies from the Roll, yet it is aided by the Statutes of Jeofailes. Cro. 1. part. 38, 90, 91, 203, 204. Miscontinuance or discontinuance, or misconveying of Process is aided by 32 H. 8. 30. The want of any Writ Original or Judicial, defaults in their Form, and insufficient Returns thereupon, are aided by 18 Eliz. 14. Cro. 3. part 259. But you must have a care the Venire facias be not faulty in any other matters of substance; for if the Parties Names be mistaken, or the issue, as if the issue be ne unques Executor, and the Venire facias be in placito debiti, &c. this is a mistryal. Cro. 2 part. 528. So it is if the Venire facias be in placito transgressionis, where the Action is in placito transgressionis & ejectionis firmæ. This misawarding of Process is not aided by any of the Statutes; and better it were that there had been no Venire facias at all in such a case, for then the Statutes would have holpen it. Cro. 3 part. 622. Stat. 18 Eliz. 14.

Venire facias dated before the Action brought.

Parties Names mistaken in a *Venire facias*.

Mis-tryal.

No *Venire facias* holpen.

It

If a Venire facias be directed to the Coroners, all the Coroners ought to joyn in the return, they being Ministers not Judges, and so both of the Sheriffs of London ought to joyn, or else the return is not good. Hob. 97. Return of Process.

Note, the principal Statutes of Jeofailes are 8 H. 6. cap. 12. and cap. 15. 32 H. 8. cap. 30. 18 Eliz. cap. 14. 21 Jac. cap. 13. and 16 and 17 Car. 2. 8. Intituled, An Act to prevent Arrests of Judgments and superseding Executions. And the three first of these Statutes do not extend to Appeals, nor to Pleas of the Crown, or to any proceedings upon them, for these are excepted; nor to the amendment of any Exigent, to make any one Outlawed. As you may see at large, Lib. 8. 162. Blackamore's Case.

Note, if the Distringas be betwixt wrong Parties, as if the Parties Names are mistaken, the Judge of Assise cannot proceed if the mistake be insisted upon; altho it would have been no Error after Verdict; held so before Justice Windham, Lent Assise, 1681. And so I have known it ruled by other Judges, and the Tryal refused. See Littleton's Reports 253.

And the four last of the said Statutes do neither extend to them nor to Actions or Informations upon Penal Laws, only in the last of them, viz. 16, 17 Car. 2. there is a limitation in the negation of the Extent, scil. Other than concerning Customs, Subsidies of Tonnage and Poundage, to which it doth extend.

If the Venire facias be directed Vicecomiti London, Salutem, &c. præcipimus tibi, and not vobis, after Verdict this is amendable. 39 Eliz. B. R. Adjudge, Rolls 200.

And so it is, if after & habeas ibi hoc breve, & Nomina Juratorum be left out, ibid. and 204.

But if the date of the Teste be after the Return, this was held not amendable, 32, 33 Eliz. B. R. ib. sed vide hic ante. But if the Award of the Venire facias upon the Roll be right, and the Writ wrong, it may be amended by the Roll, as the misprision of the Clerk. ibid. 201.

If the words, quorum quilibet habeat be left out, or duodecim, or qui nulla affinitate attingunt, or Vicecomiti be left out, these are amendable as mistakes of the Clerk. Rolls 204, 205.

Venire facias between a Party and a Stranger.

In some Cases a Venire facias shall be awarded to make an Enquest betwixt a Stranger to the Writ and Issue, and the Party. I will instance but in one, and that is upon the Statute of Westm. 2 cap. 6. If a Tenant being impleaded vouch to Warranty, and the Vouchee denieth the Deed, or other cause of the Warranty, &c. that the Demandant may not hereby be delayed, he may sue out a Venire facias to try the Issue between the Tenant and Vouchee.

Inquest at whose request.

Inquests in Pleas of Land, shall be as well taken at the request of the Tenant, as of the Demandant. 2 Edw. 3. cap. 16. If the Plaintiff or Demandant, desisteth in prosecuting his Action, and bringeth it not

not to Tryal, then the Defendant or Tenant may sue forth a Venire facias with a Proviso, which is to no other end but that the Sheriff should summon but one Jury, if the Plaintiff also should have brought him another Writ, to the same purpose; and although (as my Lord Dyer saith, fol. 215.) the granting of this Venire facias, &c. with a Proviso, depends much upon the discretion of the Court, yet for the greater part it is not grantable for the Defendant, unless when he is actor as well as the Plaintiff, or unless there be a default, and Laches in the Plaintiff; therefore there can be no Tryal by Proviso against the King (unless with the Attorny General's consent) because no default or Laches can be imputed to the King. But an avowant in Replevin, may have a Venire facias with a Proviso, immediately after issue joyned, because he is Actor, and in nature of the Plaintiff.

Venire facias by Proviso.

Proof presently after Issue joyned.

If the Plaintiff in Detinue and the Garnishee be at issue, and the Plaintiff prays a Nisi prius, and this is granted, yet the Garnishee at the same time may have a Nisi prius with Proviso, because he is Plaintiff also. Lib. 6. 46. Rolls Tit. Tryal 629.

Garnishee.

If the Plaintiff deliver the Writ to the Sheriff tarde, so late that he cannot serve, if the Defendant shall have a Writ with a Proviso.

Trade.

But at the same time the Plaintiff may have another Writ, and the Sheriff may return which of them he pleases at his Election. 8 H. 6. 6.

The Proviſo ought to be, quando duo brevia ſunt in eodem gradu & qualitate.

If the default be in the Plaintiff after iſſue in the proſecuting of the Venire facias, then the Defendant may have a Venire facias with Proviſo, but not a Habeas Corpus with a Proviſo, until the Plaintiff have made a default in the ſame Writ, for he ought only to have the ſame Proceſs with a Proviſo, in which there was a default of the Plaintiff firſt: and therefore although the Defendant had a Venire facias with a Proviſo upon a default of the Plaintiff, yet he cannot have a Niſi prius by Proviſo, without another default of the Plaintiff.

If the Defendant had a Habeas Corpus by Proviſo, and the Jury remain for want of Hundredors, yet he cannot have a Diſtringas Jur. with a 10. Tales cum Proviſo, until a default of this requeſt of a Tales is in the Plaintiff. D. 15 El. 318. 10.

How the Plaintiff may ſtop the Defendants Proviſo.

But note the Nota (in Staunford's Pleas, del Coron. f. 155.) That if by negligence of the Plaintiff, the Defendant ſues a Venire facias with a Proviſo, yet the Plaintiff may at his pleaſure ſtay the Defendant, that he ſhall not proceed in his Proceſs, in praying a Tales upon the Defendants Proceſs, as it appears T. 15 H. 7. f. 9. And the Defendant ſhall never be received to purſue this Proceſs with a Proviſo, ſo long as the Plaintiff purſues, or is ready to purſue, as appears Mich. 14 H. 7. f. 7.

Tales Men.

And ſeeing the Tales Men offer themſelves to us, we will tell them upon what account they come, before they thruſt themſelves into

to

to the Inquest, commonly for the love of eight Pence; but it may be to do some of their Neighbours a shrewd turn.

CAP. V.

Why the *Venire facias* runs to have the Jury appear at *Westminster*, though the Tryal be in the Country. Of the Writ of *Nisi prius*, when first given, when grantable, when not, and in what Writs. Of Justices of *Nisi prius*. Of the *Tales* at Common Law and by Statute. When the Transcript of the Record of the *Nisi prius* differs from the Roll, whereby the Plaintiff is Nonsuited, he may have a *Distringas de novo*.

BUT to observe the method of the Writ, the next words are Coram Justiciariis nostris de Banco apud Westminst. tali die. And here first of all you may ask me, to what purpose the Sheriff is commanded to cause the Jury to come to Westminster, when they are to try the Cause in the Country, and in truth are not to come to Westminster? I must confess the resolution of this Question is not unnecessary:

wherefore we must know, That Originally, before the Writ of Nisi prius was given, the purpose for which the twelve Men were to be summoned upon the Writ of Venire facias to come to Westminster, was that contained in the Writ, videl. Ad faciend. quandam Juratam; for then was the Tryal intended to be there, if a full Jury appeared; if not, then a Habeas Corpora, (with a Tales sometimes annexed to it, the form whereof you may see in the Register,) and if they did not appear at the Return in the Habeas Corpora, then went out the Distringas. This I speak of the Common Pleas: But the course of the Kings-Bench, and Exchequer, is, after the Venire facias, to have a Distringas, leaving out the Habeas Corpora. Tryals then were all at the Bar. (I speak not of Assises.) But now, because Jurors did not use to appear upon the Venire facias, it being without Penalty. Tryals at the Bar, are appointed upon the Habeas Corpora, and Distringas, because the Jury will more certainly appear at the day in the Distringas, through fear of forfeiting issues; which the Sheriff returns on the Distringas, not on the Venire facias. By the Statute of 18 El. cap. 5. no Jury shall be compelled to appear at Westminster, for the Tryal of an offence upon (any penal Law) committed above thirty Miles from Westminster, except the Attorney General can shew reasonable cause for a Tryal at Bar.

Why the *Venire facias* is to have the Jury appear at *Westminster*.

Hab. Corp.

Distringas.

Tryals at Bar.

Where a Jury is not compellable to appear at *Westminster*.

Thus it was at Common Law, before the giving of the Writ of Nisi prius, when all Jurors, together with the Parties came up

to

to the King's higher Courts of Justice, where the Cause depended; which (when Suits multiplied) was to the intollerable burthen of the Country, 27 E. 1. cap. 4. Wherefore by the Statute of Westminster, 2. cap. 30. A Writ of Nisi prius was first given; and that in the Venire facias as we may see in the form of the Writ there mentioned, scil. Præcipimus tibi quod venire facias coram Justiciariis nostris apud Westmon. in Octabis Sancti Michaelis, nisi talis tali die & loco ad partes illas venerint 12. &c. By which Writ it appears that the Venire facias was not returnable till after the day of the Nisi prius. But the mischief thereof was so great, partly in respect that the Parties not knowing the Jurors Names, could not tell how to make their Challenges, and so were surprised; and partly in respect of the Jury, who were greatly delayed by the Essoyns of the Parties, that by the Statute of 42 E. 3. cap. 11. It is ordained, That no Inquest, but Assises and deliverances of Goals, be taken by Writ of Nisi prius, nor in other manner, at the Suit of the great or small, before that the Names of all them that shall pass in the Inquests be returned in the Court. And their names must be returned upon a Pannel annexed to the Venire facias, so that either Party may have a Copy of the Jury, that he may know whom to challenge; and the Jury not coming upon the Venire facias, make a feigned default, which warrants the Distringas, &c. unless they appear at the day of Nisi prius.

Nisi prius, when first given and wherefore.

Stamfords Pleas of the Crown. 156.

Nisi prius in the *Venire facias*.

The Names of the Jurors must be returned into the Court before any Tryal, and why.

So

It is in the Courts discretion, whether to grant a *Nisi prius* or not.

So that by what hath been said, you may perceive to what purpose the Sheriff is commanded to cause the twelve Men to come to Westminster, though the Tryal be in the Country. And that, ad faciend. quandam Juratam, because it is in the discretion of the Court, whether to grant a Writ of Nisi prius, or to have a Tryal at the Bar. And for this, the Duke of Exeter being Plaintiff in Trespass, a Nisi prius was prayed for the Duke, and it was denied, for that the Duke was of great power in that County. And if the Tryal should be had in the Country, inconvenience might thereupon follow, as you may read, 2 Inst. 424. and 4 Inst. 161. Nay in some Cases (as if the Cause require long examination, &c.) it is not in the power of the Court to grant a Nisi prius, if the King please: for in such Cases, as appears by the Writ in the Register, 186. the King by his Writ may restrain, and command the Justices that they shall not award any Writ of Nisi prius, and if they have, that they supersede it. F. N. B. 240, 241.

When the Court cannot gant a *Nisi prius*.

No Nisi prius shall be granted where the King is party, without especial Warrant from the King, or the Attorny Generals consent. Stamf. 156. F. N. B. 241. 4 Inst. 161.

Where the King is concerned.

In a Præcipe quod reddat, if the Tenant after aid of the King, pleads to the Inquest, the Plaintiff shall not have a Nisi prius, because the Tenant hath aid of the King, and so the King is in a manner Party. 25 E. 3. 39. Neither is a Nisi prius to be granted, if any of the Parties may have prejudice by it.

If

If the Justices de Nisi prius dye before the day in Bank, yet the Record shall be received from the Clerk of Assise, without a Certiorari, or other form of Entry but the ancient form. Certification of Verdicts.

Also in that Case a Certiorari may be directed to the Executors or Administrators of the Justices, to certifie the Record, Dy. 4, 5 Mar. 163. 55. Rolls Tit. Tryal 629.

They have no power to increase Damages, nor to allow or disallow protections, nor to allow a Plea of Ercomengement in the Plaintiff. But they may Record the Protection and the Default, and this shall be allowed or disallowed in B. What things the Justices of *Nisi prius* may do.

They may demand the Jurors upon a Pein, they may amerce Jurors, and punish a Trespass done in their presence, which is in despite of the King, and for this make Process, and may fine Offenders. Jurors fur paine fine.

In Ejectment the Defendant may plead at the Assises, that the Plaintiff hath entred into parcel of the Land mentioned in the Declaration puis le darrein continuance, and the Justices of Nisi prius may accept this Plea, for it is in their Election; for if they perceive the Plea is dilatory, they may refuse it, for it is at their discretion. Sir Hugh Browns Case, in Scaccario. Mich. 8 Jac. Rolls Tit. Tryal 630. Plea puis darrein continuance.

If eleven Jurors be sworn, and the twelfth is challenged, and the Jurors cannot agree in the challenge; for ten affirm the challenge, and the other denies it, although the Party which did not take the challenge will not agree that the eleven sworn shall have another The power of the Judge upon disagreement or other matter. Challenge.

another to them in lieu of him that is challenged, yet the Court may do this.

If a challenge be taken to the Array before any Juror is sworn, and Tryors be chosen, who cannot agree, yet they shall not be commanded in custody, because they never were sworn upon the principal. But the Court may discharge them and chuse others.

Jurors discharged.

If there be three Tryors who will not agree, the Court cannot take the Verdict of two, and command the other to Prison. The same Law in case of a Verdict upon an issue.

Where fourteen Jurors are impannelled for the King, the Judge cannot discharge any of them after they are sworn, if not that they will not agree with their Companions.

Amerecment.

If the Jury say upon demand of the Court, that they are agreed, and afterwards when they are opposed, they say the contrary in any matter, they may be amerced for this. Rolls Tit. Tryal 675.

Nisi prius, why so called.

And now since the Nisi prius (for so it is called, because the word prius is before venerint in the Distringas, &c. which was not so in the Venire facias upon the Statute of W. 2. cap. 30. before rehearsed,) must not be in the Venire facias, because the Names of the Jurors are to be returned to the Court, before the granting of the Nisi prius; therefore the Nisi prius is now in the Habeas Corpus and Distringas. And if the Sheriff return not a Pannel of the Jurors upon the Venire facias, there shall be no Nisi prius upon the Tales, until a Pannel be returned.

No *Nisi prius* before the *Venire facias* returned.

27 H. 6. f. 10. 1 H. 5. f. 11. which brings me again to speak of the Tales.

A Tales is a supply of such Men, as were impannelled upon the Return of the Venire facias, grantable, when enough of the principal Pannel to make a Jury do not appear, or if a full Jury do appear, yet if so many are challenged, that the residue will not make a Jury, then a Tales may be granted. And this at the Common Law was by Writs of Decem tales, Octo tales, &c. (out of the Kings Courts) one of them after another as there was need, until there was a full Jury. But now by the Statutes of 35 H. 8. 6. 4, 5 P. M. 7. 5 Eliz. 25. and 14. Eliz. 9.

The Tales at Common Law.

Tales by Statute.

The Justices of Assise, and Nisi prius, at the Request of Plaintiff or Demandant, Defendant or Tenant, or of the Prosecutor tam quam, (if two, more, or but one of the principal Pannel appear at the day of Nisi prius,) may presently cause a supply to be made of so many Men as are wanting, of them that are there present standing about the Court; and hereupon the very Act is called a Tales de circumstantibus.

Note the difference between Tales at Common Law, and Tales by the Statute, the first called only [Tales,] the second [Tales de circumstantibus,] the last of which cannot be granted at a Tryal at Bar, which is a Tryal at Common Law; for there it must be only [Tales] by Writ annexed to the Venire facias. But Tales de circumstantibus is given by Statute to Tryals by Assise and Nisi Prius, per Stat. 35 H. 8. 6. Yet such a Tales to an Indictment in Wales, was out of that

Sta-

Statute, and helped by the 4 and 5 Ph. and Mar. 7.

Tales, in what cases it shall be granted.

If the Issue be to be tryed by two Counties, and one full Inquest appear of one County, but the Inquest remain for default of Jurors of the other County, a Tales shall be awarded to the County where the default is, not to the other.

If a Juror dye after he is Impannelled, a Tales shall issue, not a Venire facias.

What persons may have a *Tales*.

Upon a Pluries Distringas three only appear, the Plaintiff prays another Distringas, without praying a Tales, yet if the Defendant pray a Tales, the Court ought to grant it. Dy. 20 El. 359. 2.

In what Cases.

A Tales shall be granted in an Attaint, if all the Grand Jury make default.

At what time.

It cannot be granted at the day of the return of the Venire facias.

If the Venire facias be good, and the Habeas Corpus ill, if the Pannel be affirmed, yet the Tales is void, for in effect there is only a Venire facias returned, and then no Tales.

Tales with a *Proviso*.

If the Defendant hath a Habeas Corpus with a Proviso, yet the Tales ought not to be granted with a Proviso, at the Defendant's request, before a default in the request of a Tales in the Plaintiff.

At Common Law before the Statute, by custom of a Court a Tales de circumstantibus might be granted, for this is a good Custom. Dubitatur, Rolls Tit. Tryal 672.

Tales denied.

If great persons are concerned, and by their labouring the Jury doth not appear, and Tales Men are prepared for their turn,

and

and there is a great tumult de circumstantibus; the Justices of their discretion may deny a Tales, and adjourn in Bank, notwithstanding the Statute. The principal Pannel must stand, or else there can be no Tales.

If the Bayliff of the Franchise answer, that there be not sufficient of his Bailywick, the Justices may award a Tales de circumstantibus to be returned by the Sheriff.

If the Tenant for Life pray in aid of the King, who hath the reversion, the Justices cannot grant a Tales de circumstantibus, because the King is concerned.

If two Coroners or Esliers return the Pannel, one of them cannot return the Tales, &c.

If the Defendant sue the Writ of Nisi prius, by Proviso, yet the Plaintiff may have a Tales, &c.

The Sheriff may return twenty four, forty, or any number upon the Tales de circumstantibus. And it may be prayed by Attorny (although the Statute doth not mention an Attorney) as well, as in proper person. The Vouchee in a Præcipe quod reddat may pray a Tales, though he be neither Plaintiff nor Demandant in the first Action. Attorny.

If there be three Plaintiffs in Replevin, &c. and one of them makes default at the Nisi prius, the other two cannot pray a Tales; otherwise of two Copartners.

Mayor and Commonalty in their proper persons cannot pray a Tales: A Bishop or Abbot may.

Two

Two Plaintiffs in Trespass, and at the Nisi prius the Defendant shews a Record to the Court, by which it appears that one of the Plaintiffs was outlawed after the last continuance, the other cannot pray a Tales.

The Sheriffs upon the Tales de circumstantibus may Impannel a Priest or Deacon, if he hath sufficient Free-hold of Lay Fee, but not an Infant, nor one of the Age of eighty years.

What Persons of the *Tales*.

He may Impannel Coroners, Capital Ministers of any Corporation, Forresters, Men Blind, Mute (if they have their understanding, but not deaf Men) Excommunicated Persons, but not Outlawes or Attaint, nor Aliens, nor Clerks Attainted, nor Persons Attainted of false Verdicts.

The Coroners may put the Sheriff on the Tales.

Challenge.

It seems by the Statute, none of the parties can challenge the Array of the Tales but only to the Poll.

After a challenge to the Poll tryed, there shall be no other challenge to the same Poll, for any cause or matter that is at the same time.

In an Action of Trespass for taking away the Plaintiffs Mony, one of the Tales was challenged, because he was a common Forresterer of Thieves, and dwelt in a suspicious place, and of ill Fame, and held a good challenge.

For Challenges, see the Title Challenge at large.

What Iſſues ſhall be tryed by Tales de circumſtantibus, ſee William's Reading, & hic cap. 7.

But ſince none can come after the Reporter, obſerve with me his Nota Lectem in his 10th Report 104. That at Common Law, in the granting of a Tales five things are to be conſidered.

1. The time of the granting, & thereof.
2. The number of Tales.
3. The order of them.
4. The manner of Tryal, that is, whether by them with others, and whether by them only.
5. The quality of them is to be conſidered.

As to the firſt, four things are likewiſe to be conſidered.

1. That the time of granting them is upon default of ſo many of the principal Pannel, that there cannot be a full Juqueſt. At *Wickam* Aſſiſes in *Bucks*, 1684. Only one Juror appeared, who was challenged, but before he was aſide the Court granted a *Tales* by *Mountagu* Chief Baron.

2. That at the time of granting them, the principal Array ſtand, for Tales are words ſimilitudinary, and have reference to the Aſſemblance, which then ought to be in eſſe; and therefore if the Array be quaſhed, or all the Polls challenged and treited, no Tales ſhall be awarded, for then there are not Quales, but in ſuch a Caſe, a new Venire facias ſhall be awarded. But if at the time of granting the Tales, the principal Pannel

ſtand, and afterwards is quaſhed, as aforeſaid, yet the Tales ſhall ſtand; for it ſufficeth if there were Quales, at the time of granting the Tales.

3. It is to be obſerved, That he which is meerly Defendant, cannot pray a Tales till the Plaintiff hath made default.

4. In ſome Caſes a Tales ſhall be granted after a full Jury appear and is ſworn, as if a Jury be changed, and afterwards before a Verdict given in Court, one of them dye, a Tales ſhall be awarded, and no new Venire facias: and ſo if any of the Jurors Impannelled dye before they appear, and this appears by the Sheriffs return, the Pannel ſhall not abate, but if there be need, a Tales ſhall be awarded. And the time for Challenge and Tryal of the Tales, is after the principal Pannel be tryed; and if the principal Pannel be affirmed, the ſame Tryors ſhall try the Tales, but if it be quaſhed, then the two Tryors of the principal ſhall not try the Tales.

As to the ſecond, to wit the number, two things are to be obſerved.

1. That in all Caſes, the Tales ought to be under the number of the principal in the Venire facias (unleſs in Appeals) as in Attaint under twenty four, and in other Actions where the Venire facias is of twelve under twelve. And the reaſon wherefore more than the number may be granted in Appeals of the Plaintiffs part, is becauſe the Defendant may challenge peremptorily; and if default be in the Plaintiff, then the Defendant may pray a Tales, and the Reaſon is in favorem vitæ

vitæ, and that he may expedite and free himself from vexation, and the question of his life, for fear that his Witnesses should dye.

2. That the number ought always to be certain, as ten, eight, six or four, &c. But now by the Statute of 35 H. 8. a Tales de circumstantibus may be granted, as well of an uncertain as a certain number, and that by force of these words in the Statute 35 H. 8. So many, &c. as shall make a full Jury.

As to the third, to wit, the Order, It is to be known, That always in every new Tales, the number shall be diminished, as if the first be ten, the second shall be eight, and so always less. But if the Tales awarded be quashed by challenge, you may have another of the same number.

As to the fourth, to wit, the manner of Tryal, that is commonly by them with others, but by them only, when after the granting the Tales, the principal Pannel is quashed, then the Tryal shall be only by the Tales, or if the Tales do not amount to a full inquest, another Tales to supply the former may be granted.

As to the fifth, to wit, the Quality of the Tales, they ought to be of the same Quality as the Quales are; and therefore if the first be per medietatem linguæ, of English and Aliens, so ought the Tales to be; so if the Principal be out of a Franchise; so if the Venire facias be directed to the Coroners, so ought the Tales; and all things which are required by Law in the Quales are required in the Tales, as you may read in the afore-

Therefore if the *Venire facias* be not *de medietat. linguæ*, the *Tales* cannot. 3 E. 4. 12.

said Statutes. Vide Stamf. Plees del Corone, f. 155.

Where a Juror is withdrawn, when the Plaintiff intends to bring the Cause to Tryal again, he may have a Distringas, &c. with a Decem Tales.

Attaint. By the Statute of 23 H. 8. cap. 3. If there be not enough sufficient Freeholders as are required in an Attaint, in the County where such Attaint is taken, a Tales may be awarded into the Shire next adjoyning.

Nisi prius amendable. If the Transcript of the Record of the Nisi prius be mistaken, and not warranted by the Rolls, for which cause the Plaintiff becomes Non-suit, he may have a Distringas de novo, upon motion to the Court, and the Postea shall not be recorded, Cro. 1 part 204. Palmers Reports 378. For there is but a Transcript of the Record sent to the Justices of Nisi prius. First they were Justices of Assise, and therefore they retain that name still, though Assises are very rarely brought; for this common Action of Ejectment hath Ejected most real Actions, and so the Assise is almost out of use.

Justices of *Nisi prius*, and Justices of Assise.

CAP.

CAP. VI.

Of the number of the *Jurors*, and why the Sheriff returns twenty four, though the *Venire facias* mentions but twelve: If he returns more or less, no Error, and of the number twelve. And when the Tryal shall be *per primer* Jurors. And of Inquests of Office; and when to remain *pro defectu Juratorum*.

NOw for the Quales; and these you see for number must be twelve, by the Common Law, Doct. and Stud. f. 14 For quality, liberos & legales homines. And first of their number twelve: and this number is no less esteemed of by our Law than by Holy Writ. If the twelve Apostles on their twelve Thrones, must try us in our Eternal State, good reason hath the Law to appoint the number of twelve to try our Temporal. The Tribes of Israel were twelve, the Patriarchs were twelve, and Solomon's Officers were twelve, 1 Kings 4.7. vide Sir Henry Spelman, verb. (Jurata) Therefore not only matters of Fact were tryed by twelve, but of ancient times twelve Judges were to try matter in Law, in the Exchequer Chamber, and there were twelve Councellors of State for matters

Of the number 12.

Josh. 4. Genes. 49.

Plaw. Com. in procemio. 12 Judges.

of State; and he that wageth his Law, must have eleven others with him, which think he says true. And the Law is so precise in this number of twelve, that if the Tryal be by more or less, it is Mis-tryal; but in Inquests of Office, as a Writ of Waste, there less than twelve may serve. F. N. B. 107. c. And in Writs to enquire of Damages, the just number of twelve is not requisite, for they may be over or under; and so it was resolved Trin. 1651. B. R. Abbot verſ. Holt, that the Sheriff ought (in Writs of Inquiry) to summon twelve by their Names, yet Damages assessed by a less number is sufficient, and in the Writ to the Sheriff, quod ipse inquirat per Sacramentum proborum hominum, omitting (duodecim) its good and usual.

Less than 12 in inquests of Office.

Finch 400, 484.

Inquests of Office. *Vide hic* cap. 13.

And in a Writ of Inquiry of Waste by thirteen, it was holden good. 1 Cro. 414.

In Dower if the Tenant come at the Grand Cape, and say he was always ready to render Dower, and issue is taken upon this, although seisin of the Land be presently awarded, yet no Inquest of Office, but the Jury upon the Tryal of the Issue shall assess Damages. 22 E. 3. 15.

In what Cases there shall be an Inquest of Office, and in what not; see Rolls tit. Tryal 595.

And although there can be no Verdict but by twelve, yet by ancient course and usage, (which as the Lord Cook tells you, makes the Law in this Case, 1 Inst. 155.) the Sheriff is to return twenty four. And this is for expedition of Justice; for if twelve should only

Why the Sheriff returns 24

only be returned, no Man should have a full Jury appear or sworn, in respect of Challenges, without a Tales, which should be a great delay of Tryals; and for this cause at Common Law, 'twas Error if the Sheriff returned less than twenty four. But now it is remedied by the Statute of 18 Eliz. as a mis-return, see Cro. 1 Part. 223. Lib. 5. 36, 37. By which Books it appears, that if the Sheriff return but twenty three, &c. it shall not vitiate the Verdict of twelve, no, though a full Jury do not appear, so that the Tryal is by ten of the principal Pannel, and two of the Tales, notwithstanding Maynards Opinion to the contrary, and Cro. 3 part 587. The Sheriffs used to summon above twenty four, scil. eff rænatam multitudinem, but now they are prohibited by Statute to summon above twenty four. Westm. 2. cap. 38.

If the Sheriff return less than 24 it is no Error.

Keeble 1 part 310.

Must not return above 24.

If the Issue be to be tryed by two Counties, if but one of one County appear, although a full Inquest appear of the other, yet this shall remain for default, because they cannot try that which is in another County. There ought to be six of each County. And so of one Inquest out of a Franchise, and another out of the Guildable, and so of two Pannels returned in an Assise by several Bayliffs of Franchises to try one issue, and one Pannel makes default, the issue shall not be tryed by the other Pannel, for the Jurors in one Franchise cannot make the view in another Franchise. Roll. tit. Tryal 673.

In What cases the Inquest shall remain for default of Jurors.

Two Counties.

The manner of swearing the Jurors.

If the Jury be of two Counties, or two Pannels of the Guildable and Franchise, &c. they shall be sworn interchangably sett, one of one, then another of the other.

If the Jury go at large until another day after they are sworn, and the Roll of the entry be not in Court, they may be sworn anew. Toll tit. Tryal 674.

Where there must be 16. and 24. in a Jury.

To make a Jury in a Writ of Right, which is called the Grand Assise, there must be sixteen, scil. four Knights, and twelve others; the Jury in Attaint, called the Grand Jury, must be twenty four. Finch 412. and 485. But if the issue be upon a matter out of the point of the Attaint, as upon a Plea of non tenure, the Tryal shall be by twelve Juratores. 21 E. 3 10.

There may be more than sixteen in a Writ of Right. Rolls tit. Tryal, 674.

Where Witnesses joyn with the Jury, the number is uncertain.

When Process used to be made out against the Witnesses in Carta nominat. to joyn with the Jury in Tryal of the Deed, as was used before the Statute of 12 E. 3. c. 2. (his Testibus) being then part of the Deed, then the number was uncertain, according as the number of Witnesses were in the Deed: wherefore no Attaint lay, if the Deed were affirmed, because more than twelve joyned in the Verdict. But otherwise if the Deed was not found, because Witnesses cannot prove a Negative. E. N. B. 106. h. 1 Inst. 6. 2 Inst. 130. &c.

Cannot prove a Negative.

Juror departs and another sworn by consent.

If twelve are sworn, and one of them depart by consent, another of the Pannel may be sworn, and joyn with the other eleven in the Verdict. 11 H. 6. 13.

In

In Error upon a Judgment in Cornwal, because the Tryal was but by six, adjudged that it was erroneous, though it was returned secundum consuetudinem ibidem ante, &c. for such customs are against Law, unless in Wales, which are permitted by Act of Parliament. Cro. 1 part. 259. A Jury of six.

If the Record be pleaded in Bar of the Assise, and the Party that pleads says, the same Tenements were put in view to the former Jurors: If the Plaintiff saith nient compriſe, this shall be tryed per primer Jurors & auters. 13 H. 4. 10. Per primer Jurors. See *hic cap.* 4.

So if the Tenant saith that these Lands are not the same Lands before recovered, this shall be tryed per primer Jurors & auters. 22 Assise 16. and so in a Rediſſeiſin.

So in an Assise, if the Defendant plead a Recovery per view de Jurors in another Assise, this shall not be tryed by the Assise, but per primer Jurors. 13 H. 4. 10.

And if at the return of the former Jurors and others, all the former Jurors appear, the Tryal shall be by them only; but if any do not appear, they shall be supplied by the others. 40 Assise 4.

In such cases where the Plaintiff is not to recover the Land, nor to defeat the former Judgment, if nient compriſe be pleaded upon a Recovery pleaded, this may be tryed by other than the former Jurors. 1 H. 6. 5.

As in Trespass for Trees cut, the Defendant pleads that he recovered before in an Assise the same Land where, &c. and cut &c. the Plaintiff says this Land, where, &c. was not put in view, and so nient compriſe.

This

This shall not be tryed by the first Jurors, but by others, because this Action doth not defeat the former Judgment, nor recover any thing but Damages. Note the difference 1 H. 6. 5. Where the Tryal shall be per primer Jurors, and where by them and auters, and where only per auters, see Rolls tit. Tryal 593.

Certificate of Assise, what

This is where a Bayliff of a Tenant in an Assise pleadeth, &c. and loseth by the Assise, and the Tenant himself hath a Release or some other discharge to plead, then he may by this means have the Parties and first Jurors to appear again, and if it be found, he that before recovered shall lose the Land, and yield double damages. Terms of Law.

CAP. VII.

Who may be Jurors, who not; who exempted, and of their Quality and Sufficiency.

Jurors must be *Liberi*. *Vide* 2 Inst. f. 27.

SO much for their Number, next their Quality is to be considered; and for this the Writ informs you who they ought to be, 1 Liberos, that is, Freemen, not Villains or Aliens; and that not only Freemen and not Bond; but also those that have such freedom of mind that they stand indifferent, without any Obligation of Affinity, Interest, or any other Relation whatsoever

soever, to either Party; sometimes the word Probos instead of Liberos is attributed to them; they are both good Epitheres for a Juror, but I esteem the first as most significant. Forteſcue cap. 25.

Error of a Judgment in the Marshalsea, the Venire facias being Probos & Legales, not saying as the Register is, Liberos homines, &c. sed non allocatur, Judgment affirmed, Keeble 1 part, 563. *Saunders* against *Leek.*

2. They ought to be Legales, not outlawed, nor such as have lost Liberam Legem, or become infamous, as Recreants, persons attainted of Felony, false Verdict, Conspiracy, Perjury, Præmunire or Forgery upon the Statute of 5 Eliz. cap. 14. and not upon the Statute of 1 H. 5. 3. Not such as have had Judgment to lose their Ears, stand on the Pillory or Tumbrel, or have been stigmatized or branded, nor Infidels, neither can any such be Witnesses. 1 Inst. 6. Legales.

3. Homines; they ought to be Men (yet there shall be a Jury of Women to try if a Woman be Enseint, upon the Writ de ventre inspiciendo.) But what kind of Men these ought to be, is worthy to be known. And for this some Men are exempted from serving in Juries, in respect of their Dignity, as Barons, and all above them in Degree. Many are exempted by the Writ de non ponendis in Assisis, F.N.B. 166. as aged persons seventy years old, and many others are exempted, as Clerks, Tenants in ancient Demesne, Ministers of the Forest (out of the Forest) Coroners, Infants under the age of fourteen years, Officers A Jury of Women. Exemption of Juries. Who are to be exempted from Juries.

of

of the Sheriff, sick decrepit Men, and such as are exempted by the Kings Charter: yet in a Grand Assise, Perambulation, Attaint, and some other special Cases, such Men as are not exempted by reason of their Dignity shall be forced to serve notwithstanding their Exemption in other Cases. See Dalton's Office of Sheriffs, f. 121. 52 H. 3. cap. 14. 2 Inst. 127, 130, 378, 447, and 561. Counsellors, Attornies, Clerks, and other Ministers of the Kings Courts are not to serve on Juries; but I find one Jury made of Attornies of the Common Bench and Exchequer, in a Case brought upon a Will in the Exchequer, by Sir Thomas Seton, Justice, against Luce C. for calling of him Traytor in the presence of the Treasurer and Barons of the Exchequer. And this Jury of Attornies gave the Justice one hundred Marks Damages. 30 Assise 19.

A Jury of Attornies.

The Court frequently order a Jury of Merchants to try Merchants Affairs.

In what cases they shall be discharged by Charter.

If the Charter of exemption be, that he shall not be but in Juratis Assisis seu recognitionibus aliquibus, yet this shall not excuse in a Writ of Right upon Tryal of the Grand Assise, for he comes not in in this Case by such Process as in other Cases, but is chosen by the Oath of the four Chivaliers, and now he is in a manner Judge in this Case. 39 E. 3. 15.

Neither shall it exempt him in an Attaint, nor in a Grand Inquest, to inquire of Felonies, &c. because the Charter hath not this Clause, Licet tangat nos & hæredes nostros. 42 Ass. 5.

A

At the Niſi prius the Bayliffs of a Will may ſhew a Charter, that to try Contracts, &c. within the Will the Inqueſt ſhall be all of Denizens without Forreigners, and this ſhall be allowed, and the Forreigners ſhall be ouſted. 29 Aſſ. 15. At what time and how the Charter ſhall be allowed.

So may the Burgeſſes, who are put upon a Jury out of the Borough, if they have ſuch a Charter. 30 Aſſ. 1.

If a Man be Impannelled of an Inqueſt and ſhew ſuch Charter of Exemption of the ſame King in whoſe time he ſhews it, this ought to be allowed without Writ 39 E. 6. 15. Rolls ib. 633. Allowed without Writ.

The King may grant one or two to be diſcharged of Juries, but not the whole Country, for by this means there would be a failer of Juſtice; but the Grant ſhall not exempt any from ſerving in the Kings Bench, without expreſs Words.

The Jurors ought to come in perſon and claim priviledge, the Sheriff cannot return it.

4. De vicinet. de C. It is not ſufficient that they dwell in the County, but they are to be of the neighbourhood, nay le plus procheins to the place of the Fact, as by Artic. ſuper. cap. 9. it is appointed: they muſt be moſt near, moſt ſufficient, and leaſt ſuſpitious, ib. as I ſhall ſhew hereafter. Viſne.

5. Quorum quilibet habeat quatuor libras terræ, tenement. vel reddit. per annum ad minus; This is their ſufficiency, where the Debt or Damages (or both together, 1 Inſt. 272.) amount to forty Marks or above, This ſufficiency of Jurors in other Cales of leſſer Sufficiency of Jurors.

moment

moment, is ſtill left to the diſcretion of the Juſtices, Forteſcue, cap. 25. who (experience tells us) never require Jurors under 4 l. per annum, according to the Statute of 27 Eliz. cap. 6. before which Men of 40 s. per annum ſerved; but neither this nor the Statute of 35 H. 8. extend to Juries in Cities, Towns Corporate, or other priviledged places, or in the twelve Shires of Wales, ſo that there they ſhall be returned, as before they lawfully might have been; for the Jurors ſufficiency in Attaints, ſee the Statutes 15 H. 6. 5. 18 H. 6. 2. and 13 H. 8. 3.

As to the Statute 35 H. 8. 6. The tryal ordained by that Statute, lyes only in ſuch Actions, which have their ordinary tryal by twelve Men, and not more, and by Writ of Niſi prius, and this only in thoſe Actions in which the Proceſs of Venire facias, Habeas Corpora and Diſtringas lyes againſt the Jurors, and in no other Actions.

And although the Statute only mention the Tryal of iſſues joyned in the King's Courts, commonly holden at Weſtminſter, and if the Action be commenced in any other Court, yet if the Iſſue be joyned in any of the Courts at Weſtminſter, it ſhall be tryed according to the ſaid Statute; and ſo if thoſe Courts are removed from Weſtminſter, the iſſues joyned in them ſhall be tryed as the ſaid Statute directs.

And the Words betwixt party and party, ſhall only be intended of common Perſons, and not betwixt the King and any other perſon, nor when the King joyns with any other

other Perſon, in any Action which by the Releaſe or Pardon may be diſcharged before the Action brought.

In an Information of Intruſion by the Queen, a Juror was Challenged for inſufficiency of Freehold, he had but to the Value of 15 l. a Year. It was adjudged that the Statutes H. 5. 27 Eliz. &c. extend only betwixt Party and Party, and not to the Queen, and if he had any Freehold, it was ſufficient, but ſome Freehold he muſt have, Cro. Eliz. 38, 413. Sir Chriſtopher Blunts Caſe.

Which is neceſſary to be known, in reſpect of Tales de circumſtantibus, &c. See Williams his Readings upon this Statute lately come out in Print; in which there are many ingenious ſpeculations, but becauſe they do not come often in Practice, and the project of this Treatiſe is only to contain Matters uſeful for Practiſers; that the Book may not ſwell to big, I omit them, referring you to the Reading it ſelf. See afterwards in the Chapter of Challenges.

It is the general courſe of the World to eſteem Men according to their Eſtates; For Quantum quiſque ſua nummorum ſervat in arca Tantum habet & fidei: And ſure I am the makers of this Law had cauſe enough to do ſo in this Caſe; for if Men of leſs Eſtates ſhould ſerve in Juries, ſuch fellows would only be ſhifted into Inqueſts, as had more need to be relieved by the 8d. than diſcretion to ſift out the truth of the Fact: 'Tis hard to get an unbyaſſed

Jury

Jury now; but surely less Rewards would sooner bribe and byals meaner Men than these. Therefore lest poverty or necessity should tempt, every Juror must have 4 l. per annum, as aforesaid, of Free-hold out of Ancient Demesne. And the Court may in matters of great consequence, direct a Venire facias for a Jury above 4 l. per annum a-piece, but not under Cro. 2. part. 672. But in such Cases (every one knows) the Court commonly orders the Prothonotary to chuse forty eight, out of the Sheriffs Book of Free-holders, of the most substantial Men in the County, and the parties strike out twelve a-piece, then the Sheriff returns the rest.

Jurors of above 4 l. *per annum.*

Jurors of 20 l *per annum.*

Note, in former times when Estates of Inheritance were in few Mens Hands, such as had 40 s. per annum, were found sufficient Men to serve on Juries. After Estates of Inheritance coming in greater measure to the Vulgar, it was by the said Statute 27 Eliz. cap. 6. made 4 l. per annum, and the same reason improving in late times, it was thought consisting with the wisdom of a Parliament to raise it to 20 l. per annum. to the end Mens Estates might be trusted in the judgment of more knowing Judges of Fact, when they become litigious, and this was by an Act of 16 & 17 Car. 2. cap. 3. which being but a probationer, and to continue but for three years, and from thence to the end of the next Session of Parliament, it is expired; but for that it may be revived, as I humbly judge it expedient, I have thought fit to hint thus much concerning it.

Such

Such a Man who hath Land, Rent, Office or other profit Apprender, out of Ancient Demeſn, to the cleer yearly value of 4 l. of which he may have an Aſſiſe, he hath ſufficient Free-hold to be a Juror. Vide the ſaid Reading. Where you may know what Eſtate is ſufficient to make a Man a Juror. See hic in the Chapter of Challenges.

But now by the Statute 4 and 5 Will. and Mariæ, all Jurors (other than Strangers per medietat. linguæ) returned upon tryal of Iſſues joyned in the Kings-Bench, Common-Pleas or Exchequer, or before Juſtices of Aſſiſe or Niſi prius, Oyer and Terminer, Goal delivery, or general Quarter Seſſions of the Peace, ſhall have in their own name or in truſt within the ſame County 10 l. a Year, above Reprizes, of Free-hold, or Copy-hold Land, or in Ancient Demeſn, or in Rents in Fee-ſimple, Fee-tail, or for their own or ſome other perſons Life, and in Wales 6 l. a Year. If any be returned of leſſer Eſtate, he may be diſcharged by Challenge, or upon his own Oath; nor ſhall a Jurors Iſſues be ſaved but by order of Court, for reaſonable cauſe proved upon Oath.

The Sheriff, Coroner, or other Miniſter returning any perſon of leſſer Eſtate, ſhall forfeit 5 l. to their Majeſties, for every perſon ſo returned.

They muſt be ſummoned ſix days before the day of their appearance, and none to take a Reward to excuſe a Jurors appearance, on pain to forfeit 10 l. to their Majeſties.

This Act extends not to Cities, Boroughs and Towns Corporate.

Tales Men in England shall have 5 l. a Year, in Wales 3 l. a Year.

No Fee or Record shall be taken by any persons whatsoever, upon the account of any Tales returned, upon pain of 10 l. The one Moiety to the Prosecutor, the other to their Majesties.

No Writ de non ponendis in Assisis & Juratis shall be granted, unless upon Oath that the Suggestions are true.

This Act to be in force three Years, from the first of May, 1693.

Jurors must not be of affinity to the party.

Et qui nec D. E. nec F. G. aliqua affinitate attingunt, the Law is very cautelous, in not leading men into temptation: Therefore, lest Kindred and Affinity should wrong the Conscience to help a Friend, our Jurors must not be related to any of the Parties; and for this reason likewise the Statutes provide that no Man of Law shall rive Judge of Assise or Goal-delivery in his own Country, 8 R. 2. 2. 33 H. 8. cap. 24. Yet the contrary hereof is often done by a non obstante; but how consistent with integrity or prudence, they know best who procure it to be done. But because most things concerning the quality and sufficiency of Jurors, will come more properly under the Title Challenge, I will refer you thither; and first, observe more particularly, De quo vicinet. the Jury ought to come,

CAP.

CAP. VIII.

Concerning the *Viſne*, from place the *Jury* ſhall come, &c.

Vicinetum is derived of this Word Vicinus, and ſignifieth Neighbourhood, or a place near at hand, or a Neighbour place, where the Queſtion about the Fact is moved. And the moſt general Rule ſaith Coke, 1 Inſt. 125.) is, That every Tryal ſhall be out of that Town, Parith or Hamblet, or place known out of the Town, &c. within the Record, within which the matter of Fact iſſuable is alledged, which is moſt certain and neareſt thereunto, the Inhabitants whereof may have the better and more certain knowledge of the Fact. Viſne.

And if a thing be alledged in D the Venue muſt not be of D. but de vicineto de D. for otherwiſe the Neighbourhood would be excluded. Rolls tit. Tryal 622.

And if the Fact be alledged in quadam platea vocat. Kingſtreet in parochia ſanctæ Margaretæ in Civitate Weſtm. in Com. Midd. In this Caſe the Viſne cannot come out of Platea, becauſe it is neither Town, Parith, Hamlet, nor place out of the Neighbourhood, whereof a Jury may come by Law; but in this Caſe it ſhall not come out of Weſtminſter, but out of the Parith of St. Margaret, becauſe this is the moſt certain. But therein alſo it is to be noted, that if it had been al- Pariſh.

ledged in Kingſtreet, in the Pariſh of St. Margaret in the County of Middleſex then ſhould it have come out of Kingſtreet; for then ſhould Kingſtreet have been eſteemed in Law a Town: For whenſoever a place is alledged generally in Pleading (without ſome addition to declare the contrary, as in this Caſe it is) it ſhall be taken for a Town.

Town.

Parochia.

And albeit Parochia generally alledged, is a place incertain, and may (as we ſee by experience) include divers Towns; yet if a matter be alledged in Parochia, it ſhall be intended in Law, that it containeth no more Towns than one, unleſs the Party do ſhew the contrary. But when a Pariſh is alledged within a City, there without queſtion the Viſne ſhall come out of the Pariſh, for that is more certain than the City.

More 559.

If a matter be pleaded done apud Bradford in Forfeild in Parochia de Belbroughton, the Venue ſhall be of Belbroughton, and not of Bradford, for Belbroughton ſhall be intended to be a Town, and one Town ſhall not be intended to be in another Town, and therefore Bradford ſhall not be intended to be a Town Roll tit. Tryal 619.

The Venue ſhall ever be of the moſt certain place.

In a Quo Warranto for uſing a Warren in D. if the Defendant ſay the Vill D. is parcel of the Manor of S. and preſcribes to have a Warren within the ſaid Manor and Demeſnes thereof, the Venire facias ſhall be of the Manor, for the Manor by intendment is more large than the Vill. If the Viſne be

d

de D. and S. and the Venire facias be de D. S. and V. this is not good, because it is too large. If apud Burgum de Plimouth, the Venue may be de Plimouth generally. If apud Villam de Cambridge in Warda Fori, and the Venire facias is de Villa & Warda prædict. this is helpt by the Statute of Jeofails.

If the place be out of a Town, the Venue shall not be of the next Town, but from the place it self, but the Sheriff ought to return the Jury, de plus prochein Vill.

In Ejectment of Land in Foresta de Kevennon in Com. the Venue may be de vicineto Forestæ, for this is a place known, and by intendment, because the Defendant hath not pleaded in abatement, this is out of any Parish or Vill.

In inferior Courts within Boroughs, the Venire facias is Quod Venire facias 12. liberos Burgenses Burgi & Parochiæ de B. although there may be twelve Burgesses which are not Inhabitants, Rolls tit. Tryal 622. &c,

The Venue shall follow the Issue. Vide. postea.

In Trespas and Battery in London, if the Defendant justifie in Midd. by Process out of the Marshals Court, that he Arrested him, and because the Plaintiff would not go with him, he beat him, &c. Absque hoc that he is guilty in London vel alibi, out of the Jurisdiction of the Court. To which the Plaintiff replies, and acknowledges the Arrest, but says, that he beat him at London, de injuria sua propria absque tali causa, and Issue upon this, This shall be tryed in London, and the Words absque tali causa, are void,

the iſſue being joyned upon a place certain, ſcil. London, affirmed in a Writ of Error, Rolls ib. 624. But the Court ſaid, that he might have demurred upon this Plea.

De Corpore Comitatus.

If a Treſpaſs be alledged in D. and nul tiel Ville is pleaded, the Jury ſhall come de Corpore Comitatus. But if it be alledged in S. and D. and nul tiel Ville de D. is pleaded, the Jury ſhall come out de vicineto de S. for that is the more certain. So if a matter be alledged within a Manor, the Jury ſhall come de vicineto Manerii. But if the Manor be alledged within a Town, it ſhall come out of the Town, becauſe that is moſt certain, for the Manor may extend into divers Towns. And all theſe points were reſolved by all the Judges of England, upon Conference between them, in the Caſe of John Arundel Elq; Indicted for the Death of William Parker.

Manor.

De Corpore Com.

Where there may be a ſpecial Viſne, the Tryal ſhall never be de Corpore Comitatus. Leon. 1 part. 109.

If a Venire facias ought to be of one or more Vills in certain, in a County, and this is awarded de Corpore Comitatus, This ſeems to be aided by the Statute of 21 Jac. of Jeofailes, for this comes from the Vills from whence it ought to come, and from others, in as much as it comes de Corpore Comitatus. Rolls tit. Tryal 618. And many other Caſes concerning this matter.

But in Ejectment of Land, called S. and no place is named where the Land lyes, and a Venire is awarded de Corpore Com.

this

this is erroneous, and too large, because there is a place certain where the Land lyes, and yet is not named in the Nar. as it ought to be. Hob. 121.

But if the Issue be taken upon a Title of Dignity, as whether Chivaler or not, this may come de Corpore Comitatus, because that the lieu lou, &c. is not material. ib.

If A. by the Name of A. of the County of Hampshire, bring a Scire facias upon a Recognisance in Chancery in the County of Midd. against B. And the Defendant plead that the Plaintiff is Outlawed by the Name of A. of the County of Chester, to which the Plaintiff replies, that he is not una & eadem persona, this may be by the Body of the County of Midd. where the Writ is brought. ibid.

In a Quare Impedit for the Church de Uselbee, and the Defendant pleads that there is no such Church, the Venue shall not come de Corpore Comitatus, but de vicineto de Uselbee, for this is a place known, and it is intended the Church of Uselbee is within the Ville of Uselbee. Hob. 325.

In a Prohibition, if the Parties be at Issue upon a Custom de non decimando of Wood in the Wild of Sussex, the Venire facias shall be de Corpore Comitatus, for the Wild is not such a place, whereof the Court may have conusance to be sufficient to have a Jury to come from this, for the Wild is a Wood by intendment. Hob. 348. Wild.

In a real Action where the Demandant demands Lands in one County, as Heir to Heir Tryed where the Land lies, where not

his Father, and alledges his Birth in another County, if it be denyed that he is Heir, it shall not be Tryed where the Birth is alledged, but where the Land lyeth; for there the Law presumes it shall be best known who is Heir. But if the Defendant make himself Heir to a Woman (for that is the surer and more certain side, and the Mother is certain, when perhaps the Father is incertain) and therefore there it shall be tryed where the Birth is alledged, because they have more certain conusance, than where the Land lyeth.

Cro. 3 part. 818. Cro. 2 part. 303.

Bastardy.

And so it is where Bastardy is alledged, the Tryal shall be in like Case, Mutatis mutandis.

Non Concessit Where the Land lies.

If a Man plead the King's Letters Patents, and the other party plead non concessit, it shall not be tryed where the Letters bear date, for they cannot be denyed, but where the Land lyeth.

Visne.

Every Tryal must come out of the Neighborhood of a Castle, Manor, Town or Hamlet, or place known out of a Castle, Manor, Town or Hamlet, as some Forest, and the like, as before.

Visne, Of what places.

Venire facias may be of a Forest, Burgo, Castro, Warda, Parco, &c. but not of a Leet, Baliva, Market, Walk, &c. nor de lieu conus, without alledging this to be out of a Mill or Parish. Siderfin 326. But after Verdict helped by the new Statute 16, 17 Car. 2. cap 8.

Where the Writ is brought at Common-Law.

Every Plea concerning the person, Plaintiff, &c. shall be tryed where the Writ is brought.

When

When the matter alledged extendeth into a place at the Common Law, and a place within a Franchiſe, it ſhall be tryed at the Common Law.

Matters done beyond Sea may be tryed in England, and therefore a Bond made beyond Sea may be alledged to be made in any place in England, if it bear date in no place; but if there be a place, as at Burdeaux in France then it ſhall be alledged to be made in quodam loco vocat. Burdeaux in France, in Iſlington in the County of Middleſex, and from thence ſhall come the Jury, 1 Inſt. 261. Lach. 4. and 5. So if the Tenant plead that the Demandant is an Alien, born under the Obedience of the French King, and out of the Legiance of the King of England; the Demandant may reply, that he was born at ſuch a place in England, within the King's Legiance, and hereupon a Jury of twelve Men ſhall be charged, and if they have ſufficient Evidence that he was born in France, or in any other place out of the Realm, then ſhall they find that he was born out of the King's Legiance. And if they have ſufficient Evidence that he was born in England, or Ireland, or Guernſey or Jerſey, or elſewhere within the King's Obedience, they ſhall find that he was born within the King's Legiance. And this hath ever been the pleading and manner of Tryal in that caſe. So of other things done beyond Sea, the adverſe Party may alledge them to be done at ſuch a place in England, from whence the Jury ſhall come, and in a ſpecial Verdict, they may find the things done beyond Sea. Ib. Lib. 7. 26.

Matters done beyond Sea, how tryable in *England*. *Vide cap.* 10.

Keble 2 part. 315.

Alien.

Things done beyond Sea.

Lib. 7. 26.

So

Part without the Realm, and part within.

So when part of the act is done in England, and part out of the Realm, that part that is to be performed out of the Realm, if Iſſue be taken thereupon, ſhall be tryed here by twelve Men, and they ſhall come out of the place where the Writ or Action is brought. Ib. Lib. 6. 48.

Full age tryed where the Land lies.

Error, for that Judgment was given by default againſt the Defendant, being an Infant, Iſſue was taken that he was of full Age. And Godfrey moved, whether the Tryal ſhould be in Norfolk where the Land was, or in Middleſex, where the Action was brought. And the Court held, that it ſhould be tryed in the County where the Land lay; and Tanfield ſaid, it was ſo adjudged in the King's Bench, between Throgmorton and Burfind Cro. 3. part. 818.

Where the Land doth lie.

Queſtions of Title of Land (except by ſpecial Order of the Judges in ſome Caſes) are to be tryed in the County where the Land lies, for the Law is, that all real and mixt Actions, as Waſt, Ejectment, &c. muſt be brought in the County where the Land is. But Debt, Detinue, Account, Actions of the Caſe, Battery, &c. are in their own nature tranſitory, and yet they ought to be laid and tryed in their proper County, where the Fact was done, unleſs the Court, order the contrary, for ſome ſpecial Reaſons; and if they are laid out of the proper County, dayly practice tells us the Court may alter the Venue, upon Affidavit of the true place of the Fact.

Tranſitory Actions.

All

All Criminal matters are to be tryed where the offence is committed. Criminal matters.

If the Venue arise in two Counties, the Jury upon two Venire facias shall come from both, six out of one County, and six from the other. Cro. 3 part. 646. But by consent of Parties, entred upon Record, it may be by five out of one, and seven from the other, as appears, Cro. 3 part. 471. where in Replevin, the Defendant avows for Damage feasant; the Plaintiff by his Replication, claims common by Prescription in loco quo, &c. being Broadway in the County of Worcester, appurtenant to his Manor of D. in the County of Glouceſter, and issue thereupon, and two Venire facias awarded to the Sheriffs of the several Counties, and now seven of the County of Worcester appeared, and five of Glouceſter. And although there ought to have been six sworn of each County, to try that issue, as appears 49 Ed. 3. 1. 31 H. 8. 46. yet by the assent of Parties, those twelve who appeared, by advice of all the Justices, were sworn, and tryed the issue. And it was commanded that this Assent should be entred upon Record; for otherwise it would be a strange Precedent.

This is called a Joynder of Counties. *Finch* 410. Jury out of two Counties.

But out of more than two Counties it cannot be made.

In Assise of Common in Comitatus, and the issue be, whether he had Common by prescription in Land in one County, appendant to a Manor in another County, this shall be tryed by both Counties.

The same Law is in Trespass brought in one County (which cannot be in comitatus) upon such an issue the Tryal shall be

be per ambideux Counties. 49 E. 3. 20. See Rolls tit. Tryal 599. &c. Many Cases where the Jury shall come from two Counties.

In an Action upon the Statute of Marlebridge, for taking a Distress in one County and chasing in another County; upon not guilty, the Tryal shall be only by the County where the chasing is, for this is all the cause of the Action. 4 H. 6. 4.

Escape. In Escape upon Arrest in one County, and an Escape in another County, upon not guilty this shall be tryed, where the Escape is laid, for the Action is upon the Escape Rolls ib. 602.

Covenant in *P.* to sell at *R.* tryed at *P.* In an Action of Trover, apud Paxton in Com. Hunt the Defendant pleads a Bargain and Sale, apud Royston in Com. Hertford, in the Market there, whereby he after converted them, apud P. in Com. Hunt. The Plaintiff saith, that he was possessed of those Goods, apud P. in Com. Hunt. and that J. S. there stole them from him, and by Covenant betwixt him and the Defendant, at P. in Com. H. he sold them to the Defendant, as he hath pleaded: The Issue was upon the Sale made by Covenant, &c. And it was tryed in the County of Hunt. and found for the Plaintiff. And it was moved to be a mis-tryal; for it ought to have been by a Jury of the County of Hertford, or at least-wise by a Jury of both Counties: but it was adjudged to be well tryed because the Sale is confessed, and the Issue is upon the Covenant alledged in Hertford, Cro. 3. part. 511.

In

In Debt upon a Bond in London, the Defendant pleaded an Usurious Contract in the County of Warwick the Plaintiff replyed, that the Bond was made upon good consideration, Absque hoc, that it was made for such Usurious Contract: the Tryal shall be in the County of Warwick; for the Bond is confessed, and the Usury in Warwick is only in question; so if the issue be whether the Deed were made by Dures, the Tryal shall be where the Dures, and not where the Deed is supposed to be made. Cro. 3. part. 195. Usurious Contract in another County. A Dures shall be tryed there, not where the Action is brought.

Where Issue is taken upon a surrender, it shall be tryed where it was alledged to be done, and not where the Manor is, of which the Copy-hold is holden. ib. f. 260. Br. tit. Visne 114. Surrender.

In an Assumpsit laid at London, in Warda de Cheap, the Venire was De Parochia de Arcubus in Warda de Cheap, whereas no Parish was mentioned before in the Count, and adjudged that the Venire was ill laid in the Court; for a Venire facias may be of a Town, Parish, Manor, or other place known, but not of a Hundred or Ward, ib. and so it is adjudged, ib. Cro. 1. part. 165. for the Ward in a City, is but as the Hundred in a County. The Parish in London is in lieu of a Hill and the Ward of a Hundred. Roll. tit. Tryal 620, 621, 622. vide hic apres. Ward or Hundred, no good *Visne*

Where the Visne is laid to be at a City, in an Action brought in a superior Court, or within the City, though it be both a City and County, the Venire facias may be de vicinet. Civitatis, Lach. 258. Though it hath been City.

been held not good, but that the Venire facias must be de Civitate, leading out Vicinet. as you may read in Stamf. 155. But now the Case in Cro. 2 part. 308. and Bulstr. 1 part. 129. say, that all Venire facias's are awarded de vicinet. Civitatis, which is intended as well de Civitate it self, as de vicinet. infra Jurisdictionem of the City. And so it is, de vicinet. Civitatis, or de vicinet. or de Civitate Coventry, Eborum, Norwich, Sarum, Bristow, Exon, and all other Cities which are Counties in themselves. In all places besides London, no mention is made of the Parish or Ward. Ib. 493. But in London the Parish and Ward is mentioned. And therefore it was adjudged, Cro. 2 part. 150. That it was not good to alledge any thing done in London generally; but it must be in what Parish from which a Venire may be; but where a thing is laid in a City, in alta Warda there, and the Venire facias is from the City only, it is well, because it shall be intended there be no more Wards in the same City. Cro. 3 part. 282.

Rolls 622, 623.

So in all inferior Courts. Stiles 2. March 125.

London.

City.

Hundred.

In an Action against the Hundred upon the Statute of Winton, &c. upon the Roll the Venire facias is awarded of Bradley, quod est proximum Hundredum, and the Venire facias is generally of Bradley. This is well, because by the Roll it appears that Bradley and the Hundred were all one. Roll. tit. Tryal 598.

If a thing be laid done, apud Bristol, viz. in Warda Sanctæ Mariæ in Warda de Ratliff, and the Venire facias is de Warda de Ratliff, this is not good. ib. 619.

But

But if it be alledged in a Ward in the City of Briſtol, &c. the Venue ſhall be of the Ward, not de Civitate.

A Venire facias was awarded from T. and not de vicinet. de T. and for this cauſe reſolved to be ill, and not amendable. Cro. 2 part. 399. Bro. tit. ven. fac. 8. Ward

If the Iſſue be Si Rex conceſſit per literas patentes, The Tryal ſhall be, as hath been ſaid, where the Land lies, and not where the Patent was made, becauſe the Patent is of Record; and if it be traverſed, it ſhall be tryed by the Record, and therefore the Iſſue being upon non conceſſit, the Iſſue is not upon the Patent; but where the Iſſue is upon non conceſſit, or non dimiſit, of a thing which paſſeth by Deed, the Tryal ſhall be where the Grant or Demiſe is alledged: but of a Feoffment, or Leaſe for Life pleaded, the Iſſue being non Feoffavit, or non dimiſit, Livery ought to be made, and therefore the Tryal ſhall be where the Land lies. Cro. 2 part. 376. 3 part 269. *De vicinet.* left out, ill. Where the Land lies.

Where the Offence is laid in the Count to be in one County, and the Juſtification in another County, and the Plaintiff replies de injuria ſua propria, &c. The Viſne ſhall be where the Juſtification is alledged; as, one Example for all, to illuſtrate. In an Action upon the Caſe, for words ſuppoſed to be ſpoken at Bridge-North, in the County of Salop, the Defendant pleads, that he ſpake them as a Witneſs upon his Oath upon an Iſſue tryed at Chard in the County of Somerſet. The Plaintiff replies, de ſon tort Where the Action is laid in one County, and the Juſtification in another, the Tryal ſhall be where the Juſtification is.

tort demeſne, &c. And therefore it was tryed by a Venire facias of Bridg-North, and Error thereof aſſigned, becauſe it ought to have been by a Viſne of Chard, where the Juſtification aroſe, and it was held clearly to be a miſ-tryal, and not aided by the Statute of Jeofails, wherefore the Judgment was reverſed. Cro. 3 part. 468, 261, 870. More 410.

Replevin, taking two Horſes at ſuch a place in Denford in Com. Northampton, the Defendant makes Conſans as Bayliff to the Lord Mountague of his Manor of S. which Manor is holden of the Honour of Glouceſter, and that the place in which &c. is within the ſaid Honour, and alledges a Cuſtom within the ſaid Honour, on which Cuſtom the parties were at Iſſue, and the Venire facias was from Denford the place of taking, which was moved after Verdict, for that the Venue was not ſo large as the Iſſue, which was the Honour, and of this Opinion was the whole Court of C. B. Paſch. 15 Car. 2. Hull verſ. Benning.

But the great Queſtion was, whence the Venue ſhould ariſe in this Caſe, and by Bridgman Chief Juſtice, and Juſtice Hide, in no Caſe can a Venue ariſe from an Honour; and the Chief Juſtice ſaid, he had cauſed the Protonotaries to ſearch for Precedents, and they could not find that ever a Venue did ariſe from an Honour, which is but a bundle of ſervices, and an incorporeal thing, from which no Venue can come, and no an Honour may have Demeſne, as the Honours of Grafton and Hampton have, but Glouceſter not

Honours.

Siderfin 19, 88.

Chief

Chief Justice, and Justice Hide, seemed that the Venue should be de Corpore Comitat. Hob. 266. 249. But when the Court was after moved for their Opinion, they bad them take a Venire facias at their peril, and would give no Opinion.

An Action of Debt was brought on a Bond to perform Covenants in an Indenture, whereby the Defendant had granted to the Plaintiff a walk called Shrob-walk, in the Forest of ..... in Com. Northampton, and Covenanted for peaceable enjoyment, &c. and he was ousted per Earl of Northampton, who had right, on which Right Issue was joyned, and the Venire facias was from Shrob-walk.

Per Cur. Its not good, for it appears by the Record that Shrob-walk is not a Will: but if the Obligation had been laid to be made at Shrob-walk, the Venue should arise from thence, as a Will. Inter Stirt and Bales, Pasch. 19 Car. 2. B. R.

The Venue shall follow and be according to the Issue. Out of what County. *Vide hic antè & postea.*

As for words in Warwickshire, Thou art a Thief and stolest my Iron: The Defendant justifies and says, the Plaintiff stole the Iron in Leicestershire, and brought it into Warwickshire, and therefore he spake the words in Warwickshire. If the Plaintiff replies, de injuria sua propria absque tali causa, the Jury shall come from Leicester-shire, to which the absque tali causa refers, for the words are acknowledged. See Rolls tit. Tryal 598. 623.

When part of the matter to be inquired of, is in one County or place, and part in another, the Tryal shall be there where the best Conusance of the matter may be.

From the place best known.

As in an Action upon the Case; the Plaintiff declares that the Defendant took the Horse of A. at S. and sold him at D. to the Plaintiff as his proper Horse, and afterwards A. re-took the Horse. If the Defendant plead that the property was in him at the Sale, upon which Issue is joyned, The Venue shall be de S. where the taking is supposed, for there the property may be best known: which is only in question. 42 Ass. 8. See several Cases in Rolls ib. 603. under this Head.

Where the Countries cannot joyn.

If the Issue be whether L. did ride from London to York, and from York to London five times in six days, this may be tryed by London only, although part of the matter to be inquired of was done in each County.

In an Action of Battery in London, if the Defendant justifies in defence of his possession in D. in Essex,, and the Plaintiff says, de son tort demesn sans tiel cause, this ought to be tryed by both Counties if they might joyn, because he may be found guilty at another day, and therefore because they may not joyn, this may be tryed in Essex.

Of Assises in Confinio Com. See 1 Inst. 154.

In Case for Words in one County, if the Defendant justifie in another County, and the Plaintiff reply de son tort demesn, &c. although the Counties ought to joyn, if they could, and the Justification is principally put

put in Iſſue, yet the Tryal may be in either County at the Election of the Plaintiff.

Rolls tit. Tryal 620.

In Ejectment in London, upon a Leaſe made there of Land in Midd. if the Defendant plead not Guilty, this may be tryed in London. because the Counties cannot joyn, although the Jury ought to enquire of the Ejectment in Midd. and Judgment affirmed in a Writ of Error. See Rolls tit. Tryal 602.

London cannot joyn with another County 42 E. 3. 20.

Two Counties may joyn although they be not neareſt, nay though twenty Counties be between them. Finch French, 59. 1 Inſt. 154.

But if it be of a Leaſe at Ickford of Land in Bury in Suffolk, the Venue muſt be of Bury, not of Ickford. 619.

Where the Writ is brought.

If the Iſſue be taken upon the name or condition of the perſon, this ſhall be tryed in the County where the Writ is brought, 21 E. 4. 8. for this may be well known there. Rolls ib. 615.

Where the Iſſue is to be tryed upon a point which ſhall be tryed by two Counties, and one cannot joyn with the other, this ſhall by tryed where the Writ is brought. 21 E. 4. 8. But for this, ſee before where the Counties cannot joyn.

Where in other County than where the Writ is brought.

In Debt in London, againſt J. S. of D. in Eſſex, if the Defendant ſaith that he was at S. in Eſſex, at the time of purchaſing the Writ, and not at D. this ſhall be tryed in Eſſex, and not where the Writ is brought, for none can know where he dwelt ſo well as the County of Eſſex. 12 H. 6. 5.

Vide many Cases in Rolls ib. 605. &c. about this matter.

Where the escape was, and not where the Arrest was.

In an Action of the Case against a Sheriff, upon an Escape in London, and the Arrest laid to be in Southampton; adjudged, that the Visne shall be where the Escape was, because that is the ground of the Action, and not where the Arrest was. Cro. 3 part 271.

Deceit. Escape.

Nota, In an Action of the Case for Deceit, or upon an Escape, the Court will not change the Visne out of the County where the Plaintiff suppoles the thing to be done. Siderfin 87.

Scandalum. Magnatum. Informations.

Nor in a Scandalum Magnatum, upon the common Affidavit. ib. 185.

Nor in Actions upon Penal Statutes, for they must be brought in their proper County. ib. 287.

Two Counties.

Nor where the cause of Action is in two Counties, and the Plaintiff laid his Action in one of them. ib. 405.

If the Plaintiff will be bound to give no Evidence but what arises in the County where he lays his Action, the Court will not change the Venue, upon the common Affidavit. ib. 442.

Counsellor at Law, his Venue shall not be altered, because of his attendance at the Court. Modern Rep. 84.

In Debt upon an Obligation, payment was pleaded, apud domum mansionalem Rectoriæ de Much-Hadam, and the Venire facias was de vicineto de Much-Hadam, where it ought to have been de vicinet. Rectoriæ de Much-Hadam; but it was adjudged good, because

cause Much-Hadam is here intended a Mill. 3 Cro. 804. So you see that where a thing is alledged to be done at the Capital-House * of D. there the Venire shall be of D. for that is intended to be all one with the Mill. But where it is at the Castle of Hertford, &c. there the Venire facias, shall not be de vicineto de Hertford, but de Castro de Hertford, for Castrum Hertford is intended a distinct place by it self; and so of all Castles. Cro. 2 part. 239. More 862.

* Rectoriæ.

Castle.

Rolls tit. tryal. 621.

A Venire facias may be awarded of a Castle. Rolls 618.

Where the Issue is not parcel of the Manor of D. or the custom of a Manor is in question, the Venire ought to be of the Manor. Hob. 284. Cro. 2 part. 327. If the Manor be laid to be in a Mill, the Venire facias may be of the Manor in the Mill, as de vicineto manerii de Stanfted-Hall in Windham. Cro. 2 part. 405. More 581. Arundels Case, li. 6. 14.

Manor.

Roll. tit. Tryal 621.

The Venue cannot be of a Scite of a Manor. Rolls tit. Tryal 618.

In the Common-Bench, in Trespass, for taking away a Bag of Pepper. The Defendant justified as Servant of the Mayor and Comonalty of London, for Wharfage due to them by the Custom of London, which the Plaintiff refused to pay. The Plaintiff replyed that the Custom did not extend to him, because he was a Free-Man of the City, and ought not to pay Wharfage, to which the Defendant rejoyned, that the Custom extended to him, as well as to Strangers; upon which Issue was joyned.

London.

Recorder.

Reſolved, 1. That the Iſſue ſhould be tryed per Pais, not by the mouth of the Recorder, becauſe he certifies nothing but what the Mayor and Aldermen direct, who are concerned in the Cauſe.

Where the Tryal ſhall be by the County next adjoyning.

2. That the Venire facias ſhall not be awarded to the Sheriffs of London, or Middleſex, becauſe the Tryals there are by Freemen. But it ſhall be to the County next adjoyning, viz. to the Sheriff of Surry. So where any City is concerned, the Venire facias ſhall not be directed to the Officers of the City, but to the County next adjoyning, Hob. 85. Stiles 137. More 871. vide hic cap. 2. See Hardres Reports, f. 309. Good Learning concerning this matter.

If the Iſſue concern the Mayor and Commonalty of a Town, the Array ſhall be made all of Foreigners. 31 Aſſiſe 19. vide Rolls tit. Tryal 597.

So if the Iſſue concern the Mayor and Commonalty, &c. although they are not Parties, yet the Venire facias ſhall be directed to the Sheriff of the next County. 15 E. 4. 18.

Information ſur Seiſure.

See Hardres Reports, f. 16. &c. Good matter in an Information upon a ſeizure in what place the Viſne ſhall be, and the entry and manner of quaſhing one Venire facias, and awarding a Venire facias de novo, &c.

Where a Man lends his Horſe in one place, and he is ſpoiled in another, *Viſne* where he is ſpoyled.

Where a Man lends a Horſe to another to till his Land, and the Horſe dies with exceſſive Labour, the Viſne ſhall be from the place where the exceſſive Labour was, and not where the delivery was. More 887.

vide

vide Hob. 188. Rolls tit. Tryal 615. Paſch. 22 Car. 2. B. R. Horſley verſus Potter. An Action of the Caſe was brought for miſuſing a Horſe, in Itinere; the Contract was laid at Swatham in Norfolk, and the riding to Peterborough in Northamptonſhire, where the Horſe dyed, it was tryed in Norfolk; and the Court deemed that it ought to have been tryed in Northamptonſhire where the damage was done, and not where the Contract was made, but it was aided by the Statute of Jeofailes, 17 Car. 2. cap. 17. (after Verdict) that Statute being then in force.

Where a promiſe is laid in one place, and the breach in another, the Viſne muſt be according to the event of the Iſſue, whether it be taken upon the promiſe or breach. But if no place be alledged for the breach, and Iſſue be taken upon it, the Viſne muſt be from the place of the promiſe, which ſhall be intended right, where the contrary appears not, ſee Godbolt. 274.

Promiſe in one place and breach in another. *Viſne* guided by the Iſſue.

Modern Rep. 36, 37.

Eaſter 39 Eliz. In the Kings Bench, Treſpaſs, Aſſault and Battery, in Wilts, continuing the Aſſault in Middleſex, and adjudged that the Jurors ſhall come out of both Counties. More 538.

The name of a Manor, or Land, or other local thing ſhall be tryed where it lyes, becauſe it is local; but the name or addition of a perſon, ſhall be tryed where the Action is brought, becauſe this is tranſitory. Bro. tit. Viſne 7. lib. 6. 65.

Miſnomer.

Where the Land lies.

In Covenant upon an Indenture of Demiſe of the Rectory of Stoken-Church in the County of Oxford, That the Defendant had good power and Authority to demiſe: The Indenture was alledged to be made at London, and the Venire facias was awarded to the Sheriff of Oxon, and this being aſſigned for Error, Judgment was affirmed, and this adjudged to be good. More 710. Becauſe the Rectory was in Comitat. Oxon. vide page 45.

Where the Land lies. and not where the Writ, &c.

In Debt upon an Obligation in one County to perform Covenants in a Leaſe, and the Land and payments were in another County; the Tryal ſhall be where the Land and payments are, 44 E. 3. 42.

In Debt upon a Leaſe in one County, and the payment of the Rent upon the Leaſe limited there alſo, but the Land was in another County, and the payment upon the Land; this ſhall be tryed where the Land and payment was, for he was bound to pay this there upon the Diſtreſs. ib.

But the Tryal ſhould have been where the Writ was brought, if the payment had not been alledged to be where the Land was. ibid.

Where the Land and Writ, &c.

If Debt be brought for Rent upon a Leaſe for years, and the Action is brought where the Land is, but the Deed of the Leaſe bears date in another County, the Tryal ſhall be where the Land and Writ is brought. 45 E. 3. 8. The Iſſue being whether the Leſſor had a conditional Eſtate or not, and ſo a lawful eviction.

If

If the Iſſue be in an Aſſiſe, whether the Tenant be the eldeſt Son of J. S. and his birth is alledged in another County, yet this ſhall be tryed where the Land is. 46 Aſſ. 5. Where the Land lies, and where not.

If an Infant bring an Aſſiſe, and a Releaſe of his Anceſtor is pleaded againſt him, dated in another County, this muſt be tryed where the Releaſe is dated, and not by the Aſſiſe, although the Plaintiff be an Infant, and the circumſtances are to be enquired. 21 E. 3. 20. See Rolls ib. 611.

In Caſe if the Plaintiff declare upon a Truſt at D. and of a wrong at S. upon not guilty, if it appear the Truſt is not material, the Venue ſhall only come from S. and not from both places, one not being material. Where from two places in one County, and where not. *Vide cap.* cap. 10.

In caſe for ſtopping a way from ſuch a place, to ſuch a place, and that the obſtruction was at D. Upon not guilty, the Venue ſhall not come from D. only, for all the way is put in Iſſue.

If the Nar. be apud A. in Com. B. and the Venire is de Vill. & paroch. de A. 'tis ill. Yelv. 104. 2 Cro. 586. The *Venire* as large as the *Nar.* and no *Venire* from two Vills.

When the Venue ſhall be from two Vills, 2 Cro. 599. Yelv. 26, 182, 187.

In Treſpaſs in one Vill, and a Releaſe pleaded in another Vill, within the ſame County, upon non eſt factum, this ſhall be tryed per ambideux. Rolls ib. 624. vide hic ante. See Rolls ib. 615. many Caſes about this.

Where the Venue cannot be from a Vill, Hamlet or lieu conus, there it may be de Corpore Comitatus, for if it might not be ſo, the Cauſe could not be tryed. De Corpore Com.

A lieu comus is a Caſtle, Manno, or other notorious place well known, and generally taken notice of by thoſe who dwell about it, and not a Cloſe or Paſture or Ground, or ſuch like place of no repute.

A Cuſtom of a County is to be tryed de Corpore Comitatus, for the Cuſtom runs through the whole County.

Pariſh. Where the Pariſh is named by way of denotation, or explanation of the place, where the Fact is alledged to be done, as at the Pariſh-Church of Hauck-huckinol, there the Venire facias ſhall be of the Town, not of the Pariſh. Bulſtr. 1 part, 60, 61.

Town. If the Fact be alledged in King-ſtreet, in the Pariſh of St. Margaret in Com. Midd. You have already heard that the Viſne ſhall be from King-ſtreet, becauſe it is intended to be a Town; but where it is alledged to be done at Grays-Inn Hall, or Lincolns-Inn Hall, &c. in Holborn, the Viſne ſhall be from Holborn, which is the Town; for as Yelverton ſaid, it was never heard of any Venire Facias to be had of any of the Inns of Court, eſpecially of the Hall, becauſe it cannot be of a Houſe, much leſs of a Hall.

Inns of Court.

Nott from Houſe or Hall.

In Ejectment upon a Demiſe made at Denham of Lands in Parochia de Denham prædict. The Viſne may be of Denham or of the Pariſh of Denham, becauſe Denham and Parochia de Denham prædict. are all one by intendment of Law. Bulſtr. 2 part 209. More 709. Hob. 6. But when it appears by the Record, or is intended that the Pariſh is more ſpacious than the Town, as the Caſe

Pariſh.

case in More 837. where in Ejectment the Lease was alledged to be made at Bredon of Tythes in W. and W. Hamlets within the Parish of Bredon, there the Venire facias must not be of Bredon, but of the Parish, because it appears, that the Parish extends further than the Town. Hob. 326.

Where an Action of Debt for Rent, is brought upon the privity of the Contract, by the Lessor, as against the Lessee, or his Executors, for Arrearages due in the life time of the Testator, the Visne may be laid in any place; but where the Action is brought upon the privity in Estate, as against the Assignee of the Lessee, or his Executors, for Rent due after the Testators death, the Visne must be where the Lands lye. Lach. misprinted, 197, 262, 271. v. li. 3. 24. For Rent where the Land lies, and where not.

And so it was adjudged in the Case of Hall and Arnold, 1656. B. R. And it was farther adjudged there, the Case being of a Lease made at London, of Lands in Monmouth-shire, rendring Rent payable at the Old Exchange, for which an Action is brought by the Heir. If there hav been no place of payment, the Heir must have brought his Action where his Lands lie, but the place of payment being in another County, he has his Election, as on a Lease for years of Lands in two Counties.

Walker's Case, in Debt upon a Lease of Land in another County, Nihil debet shall be tryed where the Action is brought. Bro. tit. Visne 119. vide page 93. Debt for rent of Land in another County.

In

In Replevin brought by Strede against Hartly, for taking a Distress at Baildon, the Defendant made Conusance as Bailiff, because that locus in quo, &c. was holden of W. H. as of his Mannor of Baildon, and upon Issue, hors de son fee, the Venire facias was de vicineto de Baildon; and upon motion that the Venire facias ought to have been, as well from the Mannor as the Town, the Court adjudged it to be well enough, for that the Court shall not intend the Mannor was larger than the Town, because it doth not appear so to be, though possibly it might, as like the Case of Town and Parish. Hob. 305, 326.

Mannor.

If the Sheriff return that there are no Free-holders of that Visne, or if the Visne be where the Kings Writ runs not, as in the Cinque Ports, &c. or in a place where the Men are priviledged from serving on Juries out of that place, as the Isle of Ely, &c. the Plaintiff may pray a Venire facias of the Visne next adjoyning, and if the Visne be in Wales, (ou Brief le Roy ne curt) the Venire facias shall be directed to the Sheriff of the next English County, to cause the Jury to come de propinquiori Visne of his County, to the Visne in Wales adjoyning; for the Court shall not be ousted of the Plea. Fitz. Abridg. tit. Visne 8. Jurisdict. 24.

Visne next adjoyning, in what Cases.

Cinque Ports.

Wales.

In an Action against a Hundred the Venire facias may come from the next Hundred generally.

In

In Treſpaſs, if the Defendant plead not Guilty to part, and to the reſidue a Plea, which raiſes the Tryal of that to be by a Jury de Prochein Hundred. The Venire ſhall be awarded al Prochein Hundred for both Iſſues, becauſe there ought not to be two Venire facias in one Action. Vide Rolls tit. Tryal 596.

In an Appeal of Murder committed in the Cinque Ports, although the King be concerned, yet becauſe this is betwixt common perſons, the Venire facias ſhall be to the next adjoyning Hill. Ibid.

If the Iſſue be joyned of matter in Ireland, this ſhall be tryed by a Jury of the next County in England. Ibid. *Ireland.*

If the Iſſue be to be tryed by the Venue of a Mannor, and the Plaintiff ſuggeſts that he is Lord of the Hundred in which the Mannor is, and that all within the Hundred are within his Diſtreſs, if the Defendant acknowledge this, the Venue ſhall not be de Corpore Comitatus, but of the next Hundred, for if it ſhould be de Corpore Comitatus, this ſhould be tryed by the Tenants of the Mannor. Rolls ib. 667. Prochein Hundred.

If the Viſne is in ſome part miſ-awarded, or ſued out of more places or fewer than it ought to be, ſo as ſome place be right named, this is aided by the Statute of Jeofailes, which hath ended the differences in many Caſes reported in our Books, concerning this point; wherefore I purpoſely omit them. *Viſne* miſawarded in part.

Error

Infancy where the Land lies.

Error, for that the Judgment was given by default against the Defendant, being an Infant, upon Issue that he was of full Age, adjudged, that the Tryal should be in Norfolk where the Land was, and not in Middlesex, where the Action was brought. Cro. 3 part 818.

May be out of a wrong place by consent.

If the Visne cometh from a wrong place yet if it be per assensum partium, and so entred of Record it shall stand; for Omnis Consensus tollit errorem. 1 Inst. 125.

Where the Issue is local the Visne cannot be changed by consent. Siderfin 339.

Holmes versus Sanders, Hill. 22, 23 Car. B.R. Error to reverse a Judgment given in the Kings-Bench in Ireland, in Debt for Rent brought by the Assignees of a Reversion; the Plaintiff declared of a Lease of Land in such a Parish in the Suburbs of Dublin; on nil debet pleaded, the Venire facias was from the said Parish, in Civitate Dublin, and Judgment there pur Plaintiff; it was assigned for Error, because the Land lies in the Suburbs of the City, and the Venire facias was from a Parish in the City.

Per Cur. It is all one, for the Suburbs are always within the Franchise of the City, as Fleet-street is within the Suburbs of London, but the Strand not, though so reputed.

Note, it was adjudged Error in an Inferior Court, that the Venire facias was awarded secundum consuetudinem Curiæ, which ought to be per Curiam. Reader vers. Moor Mich. 1650. B. R.

E

By the Statute of 16 and 17 Car. 2. After Verdict, Judgment shall not be stayed or reversed, for that there is no right Venue, so as the cause were tryed by a Jury of the proper County or place where the Action is laid. This Act doth not extend to Appeals, Indictments of Felony, &c. nor to Actions upon penal Statutes, other than concerning Customs and Subsidies, &c.

CAP. IX.

Challenges.

YOU have already seen of what Visne the Jury ought to be: The next thing to be considered is concerning Challenges. Challenges.

Challenge is a word common as well to the English as to the French, and sometimes signifieth to claim, and the Latin word is Vindicare; sometimes in respect of Revenge, to challenge into the Field, and then it is called in Latin vindicare or provocare; sometimes in respect of partiality or insufficiency, to challenge in Court persons returned on a Jury. And seeing there is no proper Latin Word to signifie this particular kind of challenge, they have framed a Word anciently written Chalumniare, and Columpniare, and Calumpniare, and now written Calumniare, and hath no affinity with the Verb Calumnior, or Calumnia, which is derived of that, for that is of a quite other sense,

Calumniator.

ſenſe, ſignifying a falſe Accuſer, and in that ſenſe Bracton uſeth Calumniator, to be a falſe Accuſer: but is derived of the old Word Caloir or Chaloir, which in one ſignification is to care for or foreſee. And for that to challenge Jurors, is the mean to care for or foreſee that an indifferent Tryal be had, it is called Caiumniare, to challenge, that is, to except againſt them that are returned to be Jurors, and this is its proper ſignification: but ſometimes a Summons Summonitio is ſaid to be Calumniata, and a Count to be challenged, but this is improperly. And forasmuch as Mens Lives, Fames, Lands and Goods, are to be tryed by Jurors, it is moſt neceſſary that they be Omni exceptione majores, and therefore I will handle this matter more largely.

Challenge is twofold.

A Challenge to Jurors is two-fold, either to the Array, or to the Polls: to the Array of the principal Pannel, and to the Array of the Tales. And herein you ſhall underſtand that the Jurors Names are ranked in the Pannel, one under another, which order or ranking the Jury, is called the Array, and the Verb, to Array the Jury, and ſo we ſay in common ſpeech, Battail Array, for the order of the Battail. And this Array we call Arraimentum, and to make the Array, Arraiare, derived of the French word Arroiar; ſo as to challenge the Array of the Pannel is at once to challenge or except againſt all the Perſons ſo arrayed or impannelled, in reſpect of the partiality or default of the Sheriff, Coroner, or other Officer that made the Return.

To the Array.

Array

And

And it is to be known, that there is a principal cause of Challenge to the Array and a Challenge to the Favour; principal in respect of partiality, as first, If the Sheriff or other Officers be of Kindred or Affinity to the Plaintiff or Defendant, if the Affinity continue. Secondly, If any one or more of the Jury be returned at the denomination of the Party, Plaintiff or Defendant, the whole Array shall be quashed. So it is if the Sheriff return any one, that he be more favourable to the one than to the other, all the Array shall be quashed. Thirdly, If the Plaintiff or Defendant have an Action of Battery against the Sheriff, or the Sheriff against either Party, this is a good cause of challenge. So if the Plaintiff or Defendant have an Action of Debt against the Sheriff (but otherwise it is, if the Sheriff have an Action of Debt against either Party) or if the Sheriff have parcel of the Land depending upon the same Title, or if the Sheriff or his Bailiff which returned the Jury, be under the distress of either Party; or if the Sheriff or his Bailiff be either of Counsel, Attorny, Officer in Fee, or of Robes, or Servant of either Party, Gossip, or Arbitrator in the same Matter, and treated thereof. And where a Subject may challenge the Array for undifferency, there the King being a Party, may also challenge for the same Cause, as for Kindred, or that he hath part of the Land, or the like; and where the Array shall be challenged against the King, you shall read in our Books. Principal Challenges.

In Ejectment, the Plaintiff ſuggeſteth that his Leſſor, the Sheriff and Coroners were Tenants to a Dean and Chapter, whoſe Intereſt was concerned, and prayed the Venire facias to Eliſors, and had it, being confeſſed by the Defendant, and the Court took it a principal Challenge, vide Hut. 24. Moor 470. Rolls Rep. 328. Duncomb and Ingleby, Trin. 15 Car. 2. B. R.

A prayer to Eliſors in Tryals at Bar may be at the Suit of the Defendant or Plaintiff but in Niſi prius at the prayer of the Plaintiff only, and per Cur. it is a principal Challenge that the Plaintiffs Leſſor is Sheriff of Windzor, and if the Plaintiff doth not pray, &c. the Defendant may challenge the Array at the Aſſizes, Lord Brookes Caſe, Trin. 1657. B. R.

'Tis a good Challenge to the Array, that the Array is made and returned by two Coroners only, when there are four in the County, and that the Writ is returned by one of the Sheriffs of London only. So if a Bailiff return them that are out of his Franchiſe, or if an Array be to be of Perſons out of a Franchiſe and Guildable, and the Bailiff return them, for the Sheriff ought to make it; and that ſome of the Pannel were returned by the Bailiff of a Franchiſe, where the whole Pannel is returned as Array by the Sheriff, this is a good Challenge to the Array, for otherwiſe the Parties would loſe their Challenge to the Array made by the Bailiff, Rolls Tit. Tryal 636.

A

If the Defendant sue the Writ of Hab. Corpus by Proviso at the return, the Plaintiff may Challenge the Array for Kindred between the Defendant and the Sheriff, D. 15 El. 319. 13. By what Person.

D. 15 El. 319. The Array was quashed although the Sheriff was the Neuse in descent, and the Tenant in the 7 descent from the Ancestor of whom both descended, Cousin to the Parties Wife, although herself no Party. So if the Wife be dead, if Issue be alive. These are good Challenges t the Array. What Consanguinity is sufficient.

Alliance to one Party is a good Challenge. For Affinity.

If the Sheriff be allied at the making of the Pannel, and be dead at the Challenge, yet this is a good Challenge. 'Tis no Challenge that the Sheriff became of Kin after making the Pannel. At what time.

'Tis no Challenge to the Array if all the Jurors be of Affinity.

It may be after a Tales prayed, for no Challenge can be until the Jury is full. If the suggestion of Cousinage to have the Venire facias to the Coroners be denied, and the Venire facias is awarded to the Sheriff, the same Challenge shall not be allowed to the Array, but any other Cause may be alledged, than what was before denied.

Favourably made by the Sheriff or his Bailiff, or the Bailiff of a Franchise, is a good Challenge. That the Sheriff is within the Distress of a Party, or Servant to the Plaintiff, of the Robes of the Plaintiff, was Arbitrator for a Party, is Procura- For favour.

for and Maintainer of a Party, That the Sheriff purchased part of the Land in question. That the Pannel was made by the Bailiff of the Franchise of the other Party. These are good Challenges to the Array.

'Tis no principal Challenge that one Party is Tenant, or Servant to the Sheriff, but it is a good Challenge for Favour.

Denomination. It is a good Challenge to the Array, That the Sheriff made the Array, or put a Juror into the Pannel at the nonomination of any of the Parties in favour to them, or of their Servants, or of one interessed, or of a Maintainer, or of the Counsel, or of a Procurator.

Not if Strangers by the Sheriffs leave make the Pannel, or it be made at the request of both Parties.

For Malice. 'Tis a good Challenge to the Array that one of the Parties has brought an Action of Debt against the Officer that returns that Pannel, or that there is a difference betwixt the Officer and the Party, that the Officer killed his Servant.

But not that the Officer has Debt against the Party, for he may demand his Debt without Malice

How and in what manner the Challenge is to be made. The Challenge ought to be quod tempore Pannelli præd. Arraiati, the Sheriff was Cousin to the Wife of the Defendant, &c. not afterwards, nor before, unless you aver that she was alive or had issue at the making the Pannel.

If

If the Challenge be taken for Coulinage, it ought to be shewn coment Coulin, but in such a Challenge to be a Juror, 'tis not necessary to shew coment Coulin.

The matter and conveiance of the Coulinage alledged in a Challenge is not traversable. You may traverse the Coulinage prout without modo & forma. If the Challenge be that the Sheriff was Coulin to the Plaintiff, or within his distrels; 'tis no Counterplea to say he is likewise of kin to the Defendant, or within his distrels also. What Counterplea of a Challenge is good and how to be pleaded.

Where the King is Party to the Issue, no Challenge shall be to the Array for favour, 38 Ass. 19. Where the King is party.

Otherwise if the Sheriff be Vadelect of the Kings Crown, or such menial Servant.

If it be presented that J. S. hath made a Nulance to London and le gents, 'tis no Challenge to the Array, to say the Sheriff of Middlesex is deputed and removable by the Commonalty of London, because this is the Suit of the King.

The King may make his Challenge that the Sheriff is within the Parties distrels, although every Subject ows greater favour and obedience to the King, by reason of his Allegiance, than to any Lord by reason of Tenure.

In a Writ of Right, or any other Writ a Baron of the Realm may excuse himself. What Persons may be impannelled.

In a Writ of Right the Juquest ought to be all Knights. A Bannerer may be impannelled in this Writ; so may a Serjeant, if there be not Chivalers covenable.

In an Attaint upon a Recovery by false Verdict in an Assise, some Knights ought to be returned, and if there be not any in the Hundred where the Land lies, they shall be returned out of the County.

By default of the Sheriff, as when the Array of a Pannel is returned by a Bailiff of a Franchise, and the Sheriff return it as of himself, this shall be quashed, because the Party shall lose his Challenges. But if a Sheriff return a Jury within a Liberty, this is good, and the Lord of the Franchise is driven to his remedy against him.

Where there must be a Knight returned of the Jury.

If a Peer of the Realm, or Lord of Parliament be Demandant or Plaintiff, Tenant or Defendant, there must a Knight be returned of his Jury, be he Lord Spiritual, or Temporal, or else the Array may be quashed: but if he be returned, although he appear not, yet the Jury may be taken of the residue. And if others be joyned with the Lord of Parliament, yet if there be no Knight returned, the Array shall be quashed against all. So in an Attaint, there ought to be a Knight returned to the Jury.

Note, This Challenge may be taken by the Peer, but not by the other Party, who is not a Peer, for it is only the Priviledge of a Peer, *Modern* Reports 226.

If two Peers sue as Gentlemen, and admit themselves so in pleading; 'tis no Challenge

lenge to say, no Knight is returned; for the Sheriff is in no fault.

And when the King is Party, as in Traverse of an Office, he that traverseth may challenge the Array, as hereafter in this Section shall appear, and so it is in case of Life: And likewise the King may challenge the Array, and this shall be tryed by Tryors according to the usual course. The Array challenged on both sides shall be quashed. Where the King is Party.

And if two Estrangers make a Pannel, and not in favourable manner for the one Party or the other, and the Sheriff returns the same, the Array was challenged for this cause, and adjudged good.

If the Bailiff of a Liberty return any out of his Franchise, the Array shall be quashed, as an Array returned by one that hath no Franchise shall be quashed.

Challenge to the Array for Favour: He that taketh this, must shew in certain the Name of him that made it, and in whose time, and all in certainty: This kind of Challenge being no principal Challenge, must be left to the Discretion and Conscience of the Tryors; as if the Plaintiff or Defendant be Tenant to the Sheriff, this is no principal Challenge, for the Lord is in no danger of his Tenant, but e converso it is a principal Challenge; but in the other he may Challenge for Favour, and leave it to Tryal. So Affinity between the Son of the Sheriff, and the Daughter of the Party, or e converso, or the like, is no principal Challenge, but to the Favour; but if the Sheriff Challenge to the Favour.

Parry the Daughter of either Party, or e converſo, this (as hath been ſaid) is a principal Challenge, or the like. But where the King is Party, one ſhall not challenge the Array for Favour, &c. becauſe in reſpect of his Allegiance, he ought to favour the King more. But if the Sheriff be a Vadelet of the Crown, or other menial Servant of the King, there the Challenge is good; and likewiſe the King may Challenge the Array for Favour.

For the King.

To the Array.

Note, Upon that which hath been ſaid it appeareth, that the Challenge to the Array, is in reſpect of the cauſe of unindifferency, or default of the Sheriff or other Officer that made the Return, and not in reſpect of the Perſons returned, where there is no unindifference or default in the Sheriff, &c. for if the Challenge to the Array be found againſt the Party that takes it, yet he ſhall have his particular Challenge to the Polls.

To the Polls.

In ſome Caſes a Challenge may be had to the Polls, and in ſome Caſes not at all. Challenge to the Polls, is a Challenge to the particular Perſons, and theſe be of four kinds, that it is ſay, Peremptory, Principal, which induce Favour, and for default of Undredors.

Peremptory Challenge.

Peremptory, this is ſo called, becauſe he may challenge peremptorily upon his own diſlike, without ſhewing of any cauſe, and this only is in caſe of Treaſon or Felony, in favorem vitæ; and by the Common Law the Priſoner upon an Indictment or Appeal, might challenge thirty five, which was under

under the number of three Juries; but now by the Stat. of 22 H. 8. the number is reduced to 20 in Petit Treason, Murder and Felony; and in Case of High Treason, and Misprision of High Treason, it was taken away by the Stat. of 33 H. 8. But now by the Stat. of 1 & 2 Phil. & Mary, the Common Law is revived for any Treason, the Prisoner shall have his Challenge to the number of 35, and so it hath been resolved by the Justices, upon conference between them in the Case of Sir Walter Raleigh and George Brooks: But all this is to be understood when any Subject that is not a Peer of the Realm is arraigned for Treason or Felony. But if he be a Lord of Parliament, and a Peer of the Realm, and is to be tryed by his Peers, he shall not challenge any of his Peers at all, for they are not sworn as other Jurors be, but find the Party guilty or not guilty, upon their Faith or Allegiance to the King, and they are Judges of the Fact, and every of them doth separately give his Judgment, beginning at the lowest. But a Subject under the degree of Nobility, may in case of Treason or Felony, challenge for just cause as many as he can, as shall be said hereafter. In an Appeal of Death, against divers, they plead not guilty, and one joint Venire facias is awarded, if one challenge peremptorily, he shall be drawn against all. Otherwise it is of several Venire fac.

No Challenge of Peers.

Note, That at the Common Law, before the Stat. of 33 E. 1. the King might have challenged peremptorily without shewing cause, but only that they were not good for the

The Kings Challenge restrained.

the King, and without being limited to any number, but this was mischievous to the Subject, tending to infinite delays and danger. And therefore it is enacted, Quod de cætero licet pro Domino Rege dicatur quod juratores, &c. non sunt boni pro Rege; non propter hoc remaneant inquisitiones, &c. sed assignent causam calumniæ suæ, &c. whereby the King is now restrained.

Principal Challenge to the Polls.

Principal, so called, because if it be found true, it standeth sufficient of it self without leaving any thing to the Conscience or Discretion of the Triors. Of a principal cause of Challenge to the Array, we have somewhat already; now it followeth with like brevity, to speak of principal Challenges to the Polls, (that is) severally to the persons returned.

A principal Challenge is nothing else but such matter which proves evident Favour, or enmity in the Juror, and therefore it belongeth to the Justices to draw the Juror, and not to leave the decision to Triors, 21 E. 4. 11.

To the Rolls.

Principal Challenges to the Poll may be reduced to four Heads, First, Propter honoris respectum, for respect of Honour. Secondly, Propter Defectum, for Want or Default. Thirdly, Propter Affectum, for Affection or Partiality. Fourthly, Propter Delictum, for Crime or Delict.

Principal Challenges to the Polls.

First, propter Honoris respectum, As any Peer of the Realm, or Lord of Parliament, as a Baron, Viscount, Earl, Marquess and Duke, for these in respect of Honour and

and Nobility, are not to be sworn on Juries; and if neither party will challenge him, he may challenge himself; for by Magna Charta it is provided, Quod nec super eum ibimus nec super eum mittemus nisi per legale judicium parium suorum, aut per legem terræ. Now the Common Law hath divided all the Subjects into Lords of Parliament, and into the Commons of the Realm. The Peers of the Realm are divided into Barons, Viscounts, Earls, Marquesses and Dukes; The Commons are divided into Knights, Esquires, Gentlemen, Citizens, Yeomen and Burgesses: And in Judgment of Law any of the said Degrees of Nobility are Peers to another: As if an Earl, Marquess or Duke be to be tryed for Treason or Felony; a Baron, or any other Degree of Nobility is his Peer. In like manner a Knight, Esquire, &c. shall be tryed per Pares, and that is by any of the Commons, as Gentlemen, Citizens, Yeomen or Burgesses; so as when any of the Commons is to have a Tryal, either at the King's Suit, or between Party and Party, a Peer of the Realm shall not be impannelled in any Case.

Propter honoris respectum.

A Peer may challenge himself.

Peers and Commons.

Secondly, Propter defectum.

1. Patriæ, As Aliens born.

2. Libertatis, As Villains or Bondmen, and so a Champion must be a Freeman.

3. Annui census, i. e. liberi tenementi.

Challenge, *Propter defect'.*

First, what yearly Freehold a Juror ought to have, that passeth upon Tryal of the Life of a Man, or in a Plea real, or in a Plea personal,

See before cap. 7.

Quarum quilibet habeat 4 l. *&c.*

perſonal, where the Debt or Damage in the Declaration, amounteth to forty Marks, Vide Littleton, Sect. 464. Secondly, this Free-hold muſt be in his own Right, in Fee-ſimple, Fee-tayl, for term of his own Life, or for another Man's Life, although it be upon condition, or in the right of his Wife, out of ancient Demeſn; for Free-hold within ancient Demeſn will not ſerve: but if the Debt or Damage amounteth not to forty Marks, any Free-hold ſufficeth. Thirdly, he muſt have Free-hold in that County where the cauſe of the Action ariſeth, and though he hath in another it ſufficeth not. Fourthly, if after his return he ſelleth away his Land, or if Ceſtui que vie, or his Wife dieth, or an entry be made for the condition broken, ſo as his Free-hold be determined, he may be challenged for inſufficiency of Freehold.

In Caſes of Treaſon and Felony, at common Law, want of Freehold was no cauſe of challenge; probos & legales homines, was ſufficient. The Statute of 2 H. 5. is gone as to that by the Statute 1 and 2 of Queen Mary. See the Lord Ruſſels Tryal. July 13. 1683.

If ſeems before the Statute 2 H. 5. in Actions where the Freehold was concerned, the Jurors ought to have ſome Free-hold. 3 H. 4. 4. By that Statute in all Pleas real and perſonal, where the Debt or Damage, or both together amount to forty Marks, the Juror muſt have forty Shillings Free-hold. In an Attaint they muſt be able

able to expend twenty pounds per annum. Rolls tit. Trials f. 648.

In an Actompt upon the receipt of one hundred Shillings, if he count to his Damage two hundred Shillings, if the Juror hath but twenty Shillings, or under forty Shillings, 'tis sufficient, because he shall not recover Damages, and so this is not within the Statute 10 H. 6. 18. for the sufficiency of Jurors. See Rolls tit. Tryal 648.

A Man seised of a Mannor of Dale, enfeoffs a Stranger upon condition to pay yearly to J. S. and his Heirs for forty Shilings Rent. J. S. dies seised of this Rent, and then his Heir takes it, yet the Heir hath not sufficient Freehold.

Land to the value of forty Shillings is given to the Husband and Wife, and the Heirs of their two Bodies begotten, who had Issue a Son, the Husband gives the Land by Fine to an Estranger and his Heirs, and dies, the Wife enters and dies seised, the Son hath not sufficient Freehold to be a Juror.

A Man seised of Land to the value of forty Shillings within the County of Middlesex, and of Land to the value of twelve within the County of Sussex, and grants a Rent-charge of forty Shillings, issuing out of all the said Land to a Stranger, in Fee, the Grantee hath sufficient Free-hold to be a Juror in both Counties. See many speculative Cases upon this subject, in Williams his Reading upon the Statute 35 H.8. cap. 6.

4. Hun-

Challenges *propter defectum hundredorum.*

4. Hundredorum: First, by the Common Law in a Plea real, mixt and personal, there ought to be four of the Hundred (where the cause of Action ariseth) returned for their better notice of the cause; for Vicini vicinorum facta præsumuntur scire. And now since Littleton wrote, in a Plea personal, if two Hundredors appear, it sufficeth; and in an Attaint, though the Jury is double, yet the Hundredors are not double. Secondly, if he hath either Free-hold in the Hundred, though it be to the value but of half an Acre, or if he dwell there, though he hath no Free-hold in it, it sufficeth. Hundredors. Thirdly, if the cause of the Action riseth in divers Hundreds, yet the number shall suffice as if it had come out of one, and not several Hundredors out of each Hundred. Fourthly, if there be divers Hundreds within one Leet or Rape, if he hath any Free-hold, or dwell in any of those Hundreds, though not in the proper Hundred, it sufficeth. Fifthly, if the Jury come de Corpore Comitatus, or de proximo Hundredo, where one party is Lord of the Hundred, or the like, there need no Hundredors be returned at all. No Hundredors. Sixthly, if a Hundredor after he be returned, sell away his Land within that Hundred, yet shall he not be challenged for the Hundred, for that his notice remains; otherwise as hath been said for his insufficiency of Freehold, for his fear to offend, and to have Lands wasted, &c. which is one of the Reasons of Law, is taken away. Seventhly, he that challengeth for the Hundred, must shew in what Hundred it is, and not drive the other party to shew it. Eighth-

ly,

ly, his challenge for the Hundred is not ſimpliciter, but ſecundum quid; for though it be found that he hath nothing in the Hundred, yet ſhall he not be drawn, but remain præter H. that is, beſides for the Hundred; and albeit he dwelleth, or have Land in the Hundred, yet muſt he have ſufficient Free-hold.

Note, This challenge for want of Hundredors muſt be given in writing preſently, and the other party is to demur thereto, if oppoſed.

If a challenge be, that there is not any Hundredor returned, it may be averred to the Court, that there is not any ſufficient within the Hundred, which is not within the Fee of the Plaintiff, although this be not returned by the Sheriff, and this be found true by Tryors, the Array ſhall be affirmed. 45 Aſſ. 1.

If the King be made party by aid prayer, and ſufficient Hundredors do not appear, nor are returned, yet the Pannel ſhall not be quaſhed, but 2 Tales of Hundreds ſhall be returned. But betwixt common perſons in ſuch caſes the Pannel ſhall be quaſhed, and this ſhall not be only a challenge to the Heads. 25 E. 3. 43.

If the Sheriff return quod non ſunt plures del Hundred, he ſhall take of the Hundred adjoining, which ſhall be ſufficient. 19 H. 6. 48.

If the Juror hath ſufficient Land within the Hundred, although he doth not dwell within the Hundred, yet he is a ſufficient

Hun-

Hundredor, 9 H. 6. 66. May though he dwell in another County.

If he be not Hundredor at the return of the Venire, but at the return of the Diſtringas, yet this doth not take away the challenge.

At what time the Challenge muſt be.

After four are ſworn, or after a challenge to the Polls, there can be no challenge for the Hundred, Rolls tit. Tryal 636.

Who ſhall be ſufficient Hundredor, See Williams his Reading aforeſaid.

If he dwell or have Aſſets within the Leet, Rape, Franchiſe or Vill, where the Venue is, he is a ſufficient Hundredor.

If he hath Aſſets in Kent, Common, of any ſort, Market, Fair, Piſcary, Toll, paſſage, Leet, Office of Bayliwick, &c. he is a ſufficient Hundredor; otherwiſe of an Advowſon, &c.

Challenge *propter affectum.*

3. Propter affectum: and this is of two ſorts, either working a principal challenge, or to the favour. And again a principal challenge is of two ſorts, either by Judgment of Law, without any Act of his, or by Judgment of Law upon his own Act.

Principal Challenge.

And it is ſaid, that a principal challenge is, when there is expreſs favour, or expreſs malice. Firſt, without any Act of his, as if the Juror be of Blood or Kindred to either Party, Conſanguineus, which is compounded ex Con & ſanguine, quaſi eodem ſanguine natus, as it were iſſued from the ſame Blood; and this is a principal challenge, for that the Law preſumeth that one Kinſman doth favour another before a Stranger, and how far remote ſoever he is of Kindred,

Kindred. Siderfin: part 155.

yet

yet the challenge is good. And if the Plaintiff challenge a Juror for Kindred to the Defendant, it is no Counter-plea, to say that he is of Kindred also to the Plaintiff, though he be in a nearer degree. For the words of the Venire facias, forbid the Juror to be of Kindred to either Party.

Bodies Politick.

If a Body Politick or Incorporate, sole or aggregate of many, bring any Action that concerns their Body Politick or Incorporate, if the Juror be of Kindred to any that is of that Body (although the Body Politick or Incorporate can have no Kindred, yet) for that those Bodies consist of natural Persons, it is a principal challenge. A Bastard cannot be of Kindred to any, and therefore it can be no principal challenge. And here it is to be known, that Affinitas, Affinity hath in Law two senses. In its proper sense it is taken for that nearness that is gotten by Marriage, Cum duæ cognationes inter se divisæ per nuptias copulantur, & altera ad alterius fines accedit, & inde dicitur Affinis. In a larger sense Affinitas is taken also for Consanguinity and Kindred, as in the Writ of Venire facias, and otherwhere. Affinity, or Alliance by Marriage is a principal challenge, and equivalent for Consanguinity, when it is between either of the Parties, as if the Plaintiff or Defendant marry the Daughter or Cousin of the Juror or the Juror marry the Daughter or Cousin of the Plaintiff or Defendant, and the same continues, or Issue be had. But if the Son of the Juror hath married the Daughter of the Plaintiff, this is no principal chal-

Affinity

lenge, but to the favour, because it is not between the Parties. Much more may be said hereof, sed summa sequor fastigia rerum.

Peremptory Challenge upon Record.

As if he hath formerly tryed the Cause, although reversed by Error, or upon the same title; if the Record be not shewed, this challenge is not peremptory. For he that grounds a challenge upon a Record, &c. ought to have the Record ready. 33 H. 6. 55. The Record ought to be exemplified. 21 E. 4. 74.

'Tis a good challenge to say the Juror was attainted in an Attainder or Writ of Conspiracy; but attainder in a Writ of Forgery of false Deeds upon the Statute 1 H. 5. 3. (but 'tis upon 5 Eliz.) 14. is not, because this Attainder is given of late time by the Statute 33 H. 6. 55.

In a Writ of Conspiracy, 'tis a principal challenge, That the Juror was one of the Indictors, although the Tryal is now of the Conspiracy, and not upon the first point, viz. the Felony.

In Trespass, if one justifie as Master, and the other as Servant; 'tis not a principal challenge to say the Juror passed in the first Issue for the Master, but he ought to conclude, & iffint favourable. 18 E. 4. 12.

If two plead not Guilty, and first one Issue is tryed and then the other is tryed; 'tis no Challenge to say the Juror tryed the other Issue, and gave Damages, of which Damages he shall be charged if he be attainted in an Atraint, for perhaps the Defendant will be found not Guilty.

That

That the Juror is within the diſtreſs of any of the Parties, is a good cauſe of challenge. And ſo it is, if he be without the diſtreſs of any perſon concerned, although no Party to the Action. As within the diſtreſs of A. the Maſter of the Defendant, who juſtifies as Servant to A. by reaſon of his Freehold; and the Iſſue is ſur le franktenement. So for him in reverſion received, within the diſtreſs of the Tenant for Life. And ſo in an Action by the Tenant for Life, within the diſtreſs of him in reverſion: theſe are good challenges. Diens diſtreſs.

So in an Action by Dean and Chapter, within the diſtreſs of the Chapter, or one of the Chapter, are good challenges.

Conſanguinity of the half Blood is a principal challenge: If the Juror be at the ninth degree, if it can be ſhewed it is good. Principal for Conſanguinity.

In an Action by the Dean and Chapter, or Mayor and Commonalty, Brother to one of the Commonalty, or to one of the Commons, is a good challenge: ſo to any perſon concerned in intereſt, although no party to the Action. As Couſin to the Patron, or the Parſon, &c. ſo in Attaint to one of the petit Jury.

But in an Ejectment, and not Guilty pleaded; 'tis no challenge to the Array that the Sheriff is Couſin to the Leſſor of the Plaintiff: for it doth not appear that the Title of him in Reverſion ſhall be in queſtion, and he in Reverſion is no Party to the Action. See it ſo adjudged upon Demurrer. Rolls tit. Tryal 653. But now in our feigned Ejectments it is otherwiſe, be-

cause the Title of the Lessor is only in question.

Principal for Affinity.

'Tis a good Challenge that the Juror is Gossip to the Plaintiff, & sic e converso; and so although the Son be dead; for the Spiritual Affinity remains, and so is Curat of the Juror. That the Juror hath married the Sister of the party. That the Daughter of the Uncle of the Juror hath married the Uncle of the party. Cousin to the Wife of the party. These are good Challenges although the Wife, &c. is dead, if her Issue be alive; otherwise if she be dead without Issue, for then the cause of the favour is determined.

But tis no challenge to say the Juror is Brother to one who married the Sister of the party, nor that the Son of the party married the Sister of the Juror: because these are not parties to the Action.

Principal for favour.

In Attaint 'tis a good challenge to the Juror, that he hath married the Sister of the Wife of one of the petit Jury, for the Alliance.

Principal for malice.

If a Juror declare the right of one Party, or give his Verdict before hand, or take mony, this is a principal Challenge; but if he promise a party, this is not a principal challenge, but for favour.

If the Action depending betwixt the party and Juror, be such as implieth Malice, this is a good challenge; but not if it imply no Malice.

That the party hath an Appeal depending against the Juror, or the Juror against him, or Action of Battery. That they are in debate and wrangling, &c. are good challenges.

ges. Not Actions of Debt or Trespass Quare clausum fregit, &c. Nor that the Brother, &c. of the Party, hath Actions against the Juror.

Peremptory.

That the Juror was born out of the Kings Ligeance; for although he came into England an Infant, and is sworn to the King, yet he continues an Alien; and that he is Outlawed, for then he is not legalis homo, are good Challenges.

Alien.

If the Juror says that he will pass for one party, because he knows the verity of the matter, this is no challenge: But if he says 'tis for favour, 'tis a good challenge, if the Tryors find he spoke for favour, and not for truth.

For favour.

In an Action betwixt the King and a party, the Subject cannot take any challenge for favour, as in an Indictment of Barretry, &c. the Defendant cannot challenge a Juror for favour to the King.

King.

If the Record be in the same Court, it need not be shewn, but if it be in another Court, it ought to be shewed; or else 'tis no principal challenge.

How Challenges shall be taken of a Record.

After the Array is affirmed, there shall not be such challenge to a Juror which would have been a sufficient challenge to the Array. As 'tis not a good challenge that the Juror was impannelled at the denomination of a party, for this had been a good challenge to the Array.

At what time they may be taken.

If a Man challenge a Juror for non-sufficiency of Freehold, and this is adjudged against him, yet he may challenge for favour, and this shall be tryed, 10 H. 6. 18.

If the Jury upon finding of the principal do not tax the Damages, for which a Venire facias iſſues to the ſame Jurors, to tax the Damages, the parties cannot take any challenge for a cauſe before the firſt Tryal. But for a cauſe ariſing after they may. And ſo againſt les primes Jurors.

King.

The King cannot challenge a Juror after he is ſworn, unleſs it be for a cauſe ariſing after he is ſworn.

In what caſes he which challenges ought to ſhew the cauſe preſently.

If the Defendant challenge the Array which is found againſt him, or he releaſe the challenge, and the Array is affirmed, and afterwards he challenge a Juror; he ought to ſhew the cauſe preſently.

But if there be two Defendants, and one challenge the Array, and afterwards both challenge a Juror; the other ſhall not ſhew cauſe preſently.

If a Juror be challenged, and there be enough of the Pannel beſides, the cauſe of challenge need not be ſhewed unleſs the other five challenges touts peravail.

If any of the Jurors be ſworn, and there be not ſufficient, for which a Tales is granted, and at the return one of the primer Jurors is challenged, the cauſe ought to be ſhewed preſently, he being ſworn before.

King.

In an Action between the King and a common perſon, as in an Indictment of Barretry, preſentment of nuſance, &c. the Defendant if he challenges any Juror, muſt ſhew the cauſe preſently.

But

But in an Inquest betwixt the King and a Stranger, the Stranger need not shew the cause presently; for in this case the King is as a common Person of the Realm.

Cause ought to be shewed before the Tales be perused.

If both Parties challenge, although for several causes, as if one be for Favour, and the other Peremptory; yet the Juror shall be drawn without shewing cause. Treas.

It may be in an Inquest before the Sheriff to inquire of Waste, both to the Array and Polls. In what Inquest a Challenge may be.

But not in an Inquest of Office, as in a Writ of Inquiry of Damages.

In a Writ of Right a Challenge may be to the Polls del 4 Chivalers returned.

Not of Costnage to the Witnesses coming to try the Deed in an Assise.

If one Party challenge the Array which is affirmed, and afterwards challenge a Juror; he ought to shew cause presently, and this shall be tryed presently; but otherwise of the other, who did not take the Challenge to the Array. Tryal and Triors and Challenges.

The Challenge of him who first challenged, shall be first tryed; although the first be for Favour, and that of the others be riens diens H.

If the Venue be of two Counties, and both Pannels challenged, the Esliors shall be one of one Pannel and the other of the other.

If the Array be challenged, the Court to try the Array may chuse two Triors, according to their discretion, 29 Ass. 15. 19 H. 6. 9.

What Challenge they may try.

If an Action be depending between the Juror and one of the Parties, and for this he is challenged, and the other says that this is brought by Covin; the Triors may try this; for although the Action is of Record, yet the Covin is not.

Evidence.

The Juror may be examined upon a Voier dire, to any Challenge that is not to his dishonour; but the Triors are not bound by his Oath.

The Triors after they are sworn may go at large by assent of the Parties until another day.

In what cases a Challenge or Affirmance by one shall serve for others.

In Trespass against two who plead to issue, and a Venire fac. is returned, although one accept the Array, yet the other may challenge it, and if it be found, the Array shall be quashed against all. So in an Appeal against Principal and Accessory, for one shall not disinherit the other.

But in an Appeal by two, if the Defendant challenge a Juror, and one of the Plaintiffs agree to this; the other shall not be received to say that this is by Covin, but the Juror shall be drawn in favour to the Life of Man.

And yet in a Præcipe quod reddat by two and the Tenant challenge the Array, because the Sheriff is Gossip to one of the Demandants, and one Demandant acknowledge the Challenge, the other may say that this is not so, and have it tryed, Rolls Tit. Tryal 662. &c.

Ley Gager.

In Gager de Ley none shall be challenged for favour or insufficiency, &c.

If

If there be a Challenge for Coſinage, he that takes the Challenge muſt ſhew how the Juror is Couſin. But yet if the Coſinage, that is, the effect and ſubſtance be found, it ſufficeth; for the Law preferreth that which is material, before that which is formal. Coſinage.

If the Juror have part of the Land that dependeth upon the ſame Title. Depending on the ſame Title.

If a Juror be within the Hundred, Leet, or any way within the Seigniory, immediately or mediately, or any other diſtreſs of either party, this is a principal Challenge, But if either Party be within the diſtreſs of the Juror, this is no principal Challenge, but to the Favour. Diſtreſs.

If a Witneſs named in the Deed be returned of the Jury, it is a good cauſe of Challenge of him. So if one within age of one and twenty be returned, it is a good cauſe of Challenge. Witneſs. Infant.

Upon his own Act, as if the Juror hath given a Verdict before for the ſame cauſe, albeit it be reverſed by Writ of Error, or if after Verdict Judgment were arreſted. So if he hath given a former Verdict upon the ſame Title or Matter, though between other perſons. But it is to be obſerved, that I may ſpeak once for all, that in this or other like Caſes, he that taketh the Challenge muſt ſhew the Record, if he will have it take place as a principal Challenge, otherwiſe he muſt conclude to the Favour unleſs it be a Record of the ſame Court, and then he muſt ſhew the Day and Term. Challenges ariſing from the Jurors own Act. Former Verdict.

So

Indictment. So likewise one may be challenged, that he was Indictor of the Plaintiff or Defendant, either of Treason, Felony, Misprision, Trespass, or the like in the same cause.

Godfather. If the Juror be Godfather to the Child of the Plaintiff or Defendant, or e converso, this is allowed to be a good Challenge in our Books.

Arbitrator. If a Juror hath been an Arbitrator chosen by the Plaintiff or Defendant, in the same cause, and have been informed of, or treated of the Matter, this is a principal Challenge. Otherwise if he were never informed nor treated thereof; and otherwise if he were indifferently chosen by either of the Parties, though he treated thereof. But a Commissioner. Commissioner chosen by one of the Parties, for examination of Witnesses in the same cause, is no principal cause of Challenge; for he is made by the King under the Great Seal, and not by the Party as the Arbitrator is, but he may upon cause be challenged for Favour.

Arbitrator in another Matter is no cause of Challenge.

Counsel. If he be of Counsel, Servant, or of Robes or Fee, or of either Party, it is a principal Challenge.

Eat or Drink at the Parties charge. If any after he be returned, do Eat and Drink at the Charge of either Party, it is a principal cause of Challenge, otherwise it is of a Trior after he be sworn.

Actions of Malice. Action brought either by the Juror against either of the Parties, or by either of the Parties against him, which may imply Malice

Malice or Displeasure are causes of principal Challenge, unless they be brought by Covin, either before or after the return; for if Covin be found, then it is no cause of Challenge; other Actions which do not imply Malice or Displeasure, but are to the Favour, as an Action of Debt, &c. More 3.

In a cause where the Parson of a Parish is Party, and the Right of the Church cometh in debate, a Parishioner is a principal Challenge. Otherwise it is in Debt, or any other Action where the Right of the Church cometh not in question. Parson and Parishes.

If either Party labour the Juror, and give him any thing to give his Verdict, this is a principal Challenge. But if either Party labour the Juror to appear, and to do his Conscience, this is no Challenge at all, but lawful for him to do it. To labour the Jury.

That the Juror is a Fellow Servant with either party, is no principal Challenge but to the Favour. Fellow Servant.

Neither of the Parties can take that Challenge to the Polls, which he might have had to the Array. To the Polls.

Note, If the Defendant may have a principal cause of Challenge to the Array, if the Sheriff return the Jury, the Plaintiff in that case may for his own expedition, alledge the same, and pray Process to the Coroners, which he cannot have, unless the Defendant will confess it; but if the Defendant will not confess it, then the Plaintiff shall have a Venire facias to the Sheriff, and the Defendant shall never take any Chal- *Venire facias* to the Coroners.

Challenge for that cause, and so in like cases. But on the part of the Defendant, any such matter shall not be alledged, and Process prayed to the Coroners, because he may challenge the Jury for that cause, and can be at no prejudice.

Challenge to the Favour.

Challenge concluding to the Favour, when either party cannot take any principal Challenge, but sheweth causes of Favour, which must be left to the Conscience and Discretion of the Triors, upon hearing their Evidence to find him favourable or not favourable. But yet some of them come nearer to principal Challenge than other; As if the Juror be of Kindred, or under the distress of him in the Reversion or Remainder, or in whose Right the Avowry or Justification is made, or the like: These be principal Challenges, because he in Reversion, Remainder, or in whose Right the Avowry or Justification is, is not party to the Record; otherwise it is, if they were made parties by Aid, Receipt or Voucher, and yet the cause of Favour is apparent; so it is of all principal causes, if they were party to the Record. Now the causes of Favour are infinite, and thereof somewhat may be gathered of that which hath been said, and the rest I purposely leave the Reader to the reading of in our Books concerning that Matter. For all which the Rule of Law is, That he must stand indifferent as he stands unsworn.

Favour.

King.

The Subject may challenge the Polls, where the King is party. And if a Man be outlawed of Treason or Felony at the Suit

of

of the King, and the party for avoiding thereof allegeth Imprisonment, or the like, at the time of the Outlawry, though the Issue be joyned upon a collateral point, yet shall the party have such Challenges, as if he had been arraigned upon the crime it self, for this by a mean concerneth his Life also.

Propter delictum, As if the Juror be attainted or convicted of Treason or Felony, or for any Offence to Life or Member, or in Attaint for a false Verdict, or for Perjury as a Witness, or in a Conspiracy at the Suit of the King, or in any Suit (either for the King or for any Subject) be adjudged to the Pillory, Tumbrel, or the like, or to be branded, or to be stigmatised, or to have any other Corporeal Punishment whereby he becometh Infamous, (for it is a Maxim in Law, Repellitur a sacramento infamis,) these and the like are principal causes of Challenge. So it is if a Man be outlawed in Trespass, Debt, or any other Action, for he is Exlex, and therefore is not legalis homo. And old Books have said, That if he be excommunicated, he could not be of a Jury. Challenges *Propter delict'*. Infamous. Outlawed.

A Bastard may be of a Jury, yet may be challenged if he be of Kindred, Jenk. Cent. 1. cap. 90. Bastard.

See the Statutes of W. 2. and Artic. supra Chartas, what persons the Sheriff ought to return on Juries. And see F. N. B. Breve de non ponendis in Assisis & juratis; and the Register in the same Writ. And see there what remedy Who ought to be on Juries.

remedy the party hath that is returned against Law.

At what time Challenges must be taken.

It is necessary to be known, the time when the Challenge is to be taken. First, He that hath divers Challenges, must take them all at once, and the Law so requireth; indifferent Trials, and divers Challenges are not accounted double. Secondly, If one be challenged by one party, if after he be tried indifferent, it is time enough for the other party to challenge him. Thirdly, After Challenge to the Array, and Trial duly returned, if the same party take a Challenge to the Polls, he must shew cause presently. Fourthly, So if a Juror be formerly sworn, if he be challenged, he must shew cause presently, and that cause must rise since he was sworn. Fifthly, When the King is party, or in an Appeal of Felony, the Defendant that challengeth for cause, must shew his cause presently. Sixthly, If a Man in case of Treason or Felony, challenge for cause, and he be tried indifferent, yet he may challenge him peremptorily. Seventhly, A Challenge for the Hundred must be taken before so many be sworn as will serve for Hundredors, or else he loseth the advantage thereof.

Hundredors.

Writ of Right.

In a Writ of Right, the Grand Jury must be challenged before the four Knights, before they be returned in Court; for after they be returned in Court, there cannot any Challenge be taken unto them.

Note,

Note, The Array of the Tales shall not be challenged by any one party, until the Array of the principal be tryed; but if the Plaintiff challenge the Array of the principal, the Defendant may challenge the Array of the Tales. After one hath taken Challenge to the Poll, he cannot challenge the Array. The Array of the *Tales*.

Now it is to be seen how challenge to the Array of the principal Pannel, or of the Tales, or of the Polls shall be tried, and who shall be Triors of the same, and to whom Process shall be awarded.

If the Plaintiff allenge a cause of Challenge against the Sheriff, the Process shall be directed to the Coroners; if any cause against any of the Coroners, Process shall be awarded to the rest; if against all of them, then the Court shall appoint certain Elisors or Eliors, (so named ab eligendo) because they are named by the Court, against whose Return no Challenge shall be taken to the Array, because they were appointed by the Court, but he may have his Challenge to the Polls. Note, If Process be once awarded for the partiality of the Sheriff, though there be a new Sheriff, yet Process shall never be awarded to him; for the Entry is, Ita quod Vicecomes se non intromittat. But otherwise it is, for that he was Tenant to either party, or the like. Coroners. Elisors.

If the Array be challenged in Court, it shall be tried by two of them that be impannelled to be appointed by the Court: for the Triors in that case shall not exceed the Array. Two Triors.

the number of two, unleſs it be by conſent. But when the Court names two for ſome ſpecial cauſe alledged by either party, the Court may name others; if the Array be quaſhed, then Proceſs ſhall be awarded, ut ſupra. If there be a demur to a Challenge, the Judge before whom the cauſe is to be tried, may determine it, or adjourn it to be heard another time, Stiles 464. Vide Bulſtr. 1 part 114.

Demur to a Challenge, how determinable.

Array of the Principal and *Tales*.

If a Pannel upon a Venire facias be returned, and a Tales, and the Array of the principal is challenged, the Triors which try and quaſh the Array, ſhall not try the Array of the Tales; for now it is, as if there had been no appearance of the principal Pannel; but if the Triors affirm the Array of the Principal, then they ſhall try the Array of the Tales. If the Plaintiff challenge the Array of the Principal, and the Defendant the Array of the Tales, there the one of the Principal and the other of the Tales ſhall try both Arrays. For other matter concerning the Tales, ſee in Cooks Reports, matters worthy of obſervation.

Two Triors.

When any Challenge is made to the Polls, two Triors ſhall be appointed by the Court; and if they try one indifferent, and he be ſworn, then he and the two Triors ſhall try another; and if another be tried indifferent, and he be ſworn, then the two Triors ceaſe, and the two that be ſworn on the Jury ſhall try the reſt.

Trials of Challenges.

If any of the Jury, after ſome of them be ſworn, be challenged, thoſe that are ſworn are to ſay, whether he that is challenged

be

be indifferent or not. But if the first or second Man be challenged, then the Court doth use to appoint some of them, (who it pleaseth,) that shall be afterwards sworn to try the indifferency of the person challenged.

Rules concerning Challenges.

1. All Challenges must be taken before the Jurors are sworn.

2. If one challenge a Juror, and it be found against the Challenger, he may not challenge the Juror for the second cause.

3. If one challenge the Array, and it be found against him, he may not afterward challenge any of the Polls, without shewing cause presently; and this shall be tryed presently.

4. No Challenge shall be admitted against the Triors appointed by the Court.

Trial of Challenges.

If the Plaintiff challenge ten, and the Defendant one, and the twelfth is sworn, because one cannot try alone, there shall be added to him one challenged by the Plaintiff, and the other by the Defendant. When the Trial is to be had by two Counties, the manner of the Trial is worthy of observation, and apparent in our Books. If the four Knights in the Writ of Right be challenged, they shall try themselves, and they shall choose the Grand Assise, and try the Challenges of the parties. If the cause of Challenges touch the dishonour or discredit of the Juror, he shall not be examined upon his Oath; but in other cases he shall be examined upon his Oath, to inform the Triors. If an Inquest be awarded by default the Defendant hath lost his Chal-

Juror examined.

lenge; but the Plaintiff may challenge for just cause, and that shall be examined and tried.

View. Whereſoever the Plaintiff is to recover per viſum juratorum, there ought to be ſix of the Jury that have had the view, or known the Land in queſtion ſo, as he be able to put the Plaintiff in poſſeſſion, if he recover.

Challenges In Proprietate probanda, and a Writ to inquire for Waſte, the parties have been received to take their Challenges. But paſſing over many things touching this matter, I will conclude with the laying of Bracton, Plures autem aliæ ſunt cauſæ recuſandi juratores, de quibus ad præſens non recolo, ſed quæ jam enumeratæ ſunt, ſufficiant exempli cauſa, 1 Inſt. 157, 158.

Trait what. Trait doth ſignifie as taken out or withdrawn, and is applied to a Juror, that is withdrawn by conſent, or removed and diſcharged by Challenge.

A Juror ſick was withdrawn, and another ſworn, Palmers Rep. 411.

King. After Evidence given the King cannot draw a Juror, but before he may; but after Evidence on his prayer the Court may diſcharge the Jury, Keble 2 part, 506.

Challenge loſt. If the Defendant do not appear at the Trial when he is called, he loſeth his Challenge to the Jurors, although he doth afterwards appear.

A wrong name. 'Tis a good Challenge to a Juror to ſay he is returned by another Name in the Pannel.

A

A Juror appeared and ſaid he had no Freehold, and prayed that he might not ſerve, yet the Judge would not ſpare him; for he may have an Action againſt the Sheriff for returning him, Rolls 2 part, Reports 483. No Freehold.

The Challenge pro defectu Hundred. muſt be written in Parchment, and the Council muſt arraign it in French, upon which the Defendant may take Iſſue or demur. The Clerk or Aſſociate in Court muſt call the Jury over, and ask if they have any Lands within the Hundred, or had at the time of the Array of the Pannel, and whether they dwell, or did dwell, in the ſame. And upon examination if it appear clearly, that they have no Lands or Tenements, nor dwell in the Hundred; then the Clerk is to mark them by the ſide of every of their Names thus [præter Hundred.] but if he find there be two Hundredors, he is to reſort back to the præter Hundred. and ſwear them in order. So that you ſee the Trial whether Hundredors or not, is determined by the Courts examination by the Poll ſeverally. But if the Council demur, and the other ſide joyn in Demurrer, the Judge of Aſſiſes may affirm the Challenge, and over-rule the Demurrer, or allow the Demurrer good, and proceed to the Trial of the Cauſe; or if the Judge doubt, it may be determined in Bank, but this is great delay. If the Challenge be adjudged good, the Court awards, Que le pannel il ſoit caſſe.

In Cities, Corporations, Burroughs and Towns, and Counties, this Challenge cannot be.

At Common Law there ought to have been 4 Hundredors returned and appear in all Actions pro meliori notitia causæ in controversia, for vicini vicinorum facta scire præsumuntur. But by the Statute 35 H. 8. cap. 6. six are to be returned and appear. But since by the Statute 27 Eliz. cap. 6. if two Hundredors be returned and appear, it is sufficient in all personal Actions: But in real Actions there must be six, or else Remanet pro defectu Jur.

Hundredors.

Note, In an Information of Forgery to be tried at Bar upon the Attorny Generals motion, that the Defendant might not challenge for want of Hundredors; it was denied him, Keble 3 part, 740.

The Court shall appoint two Triors in a Challenge to the Poll, and if they find two indifferent, the first Triors shall be discharged, and the two that are found indifferent, being sworn to try the Issue, shall also be sworn to try the rest of their Fellows.

Tales de circumstantibus may be in the case of Aliens.

At Common Law there used to be returned 24 upon the Venire, and afterwards a Habeas corpora with a Decem Tales, and if a full Jury did not appear or were challenged, then a Distringas with an Octo Tales, and so to the Duo Tales, if there were not a full Jury. And this was the course until the Statute 35 H. 8. which gives the Tales de circumstantibus at the Assises, &c. and by the Stat 5 Phil. & Mar. cap. 7. where the King, Queen or Informer, &c. are parties.

A Challenge may be taken to those of the Tales de circumstantibus.

By

By the Statute 33 Ed. 1. The King and those who prosecute for him, must shew their cause of Challenge, as betwixt party and party, and left to the discretion of the Justices.

The King or any one authorised for him may release his Challenge. Where the party may challenge, the King may challenge.

'Tis no Challenge to say, the Juror is the King's Tenant, or that he is favourable to the King; but 'tis good to say, the Sheriff or Juror bears grudge or malice to the Defendant where the King is party. If the Juror hath any Freehold 'tis sufficient, although not to 40 s. a year: For the Statute which injoins that, speaks only betwixt party and party.

The first who challenges, be he Plaintiff or Defendant, shall have the preference and advantage of his Challenge. If a Juror be once challenged and withdrawn upon the principal, he cannot serve upon the Tales, if he doth 'tis Error, and Judgment may be staied; And so if he be challenged, and a Jury remain pro defectu Juratorum, if he be sworn upon a new Distringas, 'tis Error, not helped by any Statute of Jeofails, and a mistrial, and a Venire facias de novo may be awarded, Cro. El. f. 429. Whitbies Case.

Elisors may be sworn in some cases to return and impannel all Juries, as should upon any Venire facias, Habeas corpora or Distringas Jur. come to their Hands impartially, indifferently and without favour or affection, nor at the denomination of any person.

The Record of Attainder, Conviction, Excommunication, Outlawry, &c. or a Copy thereof ought to be produced to prove the cause of challenge thereupon.

Where Bodies Politick or Corporate are concerned, a Challenge may be taken which arises from the individuals, as Brother to one of the Prebendaries, is a good Challenge where the Dean and Chapter are parties, &c. Hob. 87. So a Parishioner, where the Right of the Church comes in question at the Suit of the Parson, 17 Ass. 15.

In High-Treason the Prisoner may peremptorily challenge to the number of 35, which is under the number of 3 Juries, but in Petit Treason, Murder or Felony the number is reduced to 20. The Prisoner may challenge any that are Witnesses against him.

Where the King is party the Defendant must shew the cause of his Challenge instantly.

After a Challenge for cause, the Prisoner may challenge the same person peremptorily.

Grand Jury. One of the Petty Jury was challenged because he had been of the Grand Jury, and found the Bill, Siderfin 244. 'Tis a good Challenge.

CAP.

CAP. X.

Of what Things a Jury may inquire; when of Spiritual; when of Things done in another County, or in another Kingdom; when of Eſtopples, and when not; when of a Mans Intent, &c.

THE next Words in the Writ, which have not yet been taken notice of, are theſe, Per quos rei veritas melius ſciri poterit; and this is the chief end of their meeting together: No Court can give a right Judgment, unleſs the truth of the Fact be certainly known; and to find out his Truth, no way is like to this of Juries: for they do not only go upon their own knowledge, though they are Neighbours to the place where the queſtion is moved, and ſo are preſumed to have a better knowledge of the Fact, than any others; for vicinus facta vicini præſumitur ſcire; But leſt this preſumption ſhould fail, the Law allows other Evidence to be given to them, by which they may more certainly and confidently give their Verdict of the Iſſue, which is meant by this word Rei. See more of this matter, *cap.* 13. *Ex facto Jus oritur.*

And here it will not be amiſs to give you a brief deſcription, de quibus rebus, what the Inqueſt may inquire of, and find.

Of the Law.

Wherefore, though it be true, that a Jury shall not be charged, or meddle with a matter of Law; and if they do, and find it, their Verdict as to this shall be void; yet daily experience (as well as Littleton, Sect. 368.) tells us, that they may take upon them the knowledge of the Law, and give a general Verdict; though to find the Special Matter is the safest way for them, because, if they mistake the Law, they run into the danger of an Attaint.

In the Case of Manby and Scot, adj Trin. 13 Car. 2. B.R. one question was if the Verdict was well found, in an Action of the case against the Husband for Wares bought by the Wife; the Verdict finding, that the Wares were necessaries, and according to her Degree, whereas (as was objected) they ought to have found the Degree of the party, and the value of the Wares and left it to the Court to judge.

But it was answered and resolved that the Court, i. e. the Judge before whom 'tis tried informs the Jury of the Matter of Law, and accordingly they find, and so it belongs not to this Court.

Broughton a Reader of the Temple brought a Bill by Quo minus in the Chequer against Prince for maintaining a Suit against the Stat. &c. Prince pleads that he was admitted in the Inner-Temple, and Student for many years there, that he was Consiliarius, in Lege eruditus, and took his Fee in that cause. B. replied, de Injuria sua propria absque hoc quod in lege eruditus, &c. & hoc petit, &c. & defendens similiter.

It

It was moved that the Defendant should demur to the Replication. Atkinson excepted to the Traverse and Conclusion; for it cannot be tryed by a Jury; for (says he) if matters in Law be to be tryed by the Judges, a fortiori, the learning of the Law ought to be tryed by them.

Per Manwood Chief Baron, It shall be tryed by the Country. 3 Leo. 237. Broughton verſ. Prince; which Case is cited 3 Cro. 728. to be otherwise ruled; yet it was allowed there a good Issue, whether a Parson of a Parish could speak Welsh.

Hut. 20, 21. Whether a plaint was levied according to the custom, was tryed by a Jury who are directed by the Court, as to the plaint, and whether it were pursuant to the custom, and are to find according to such directions.

In many Cases, the Jury are to enquire of the knowledge and intent of a Man, as where the Nar. is, that the Defendant kept a Dog which killed the Plaintiffs Sheep, sciens canem suum ad mordendos oves consuetum; though sciens be not traversable, yet the Jury upon Evidence must enquire of it. lib. 4. 18. Of a Mans intent.

In some Cases, a Jury may try and find a spiritual thing, as a Divorce, Matrimony, &c. and must take notice thereof, upon pain of Attaint. li. 4. 29. lib. 9. lib. 7. 43. vide hic cap. 2. Of Spiritual things.

The Jury may find Bastardy, but it was pleaded it must be tryed by Certificate. Bastard.

So they may find a Divorce, for it is not matter of Record, but a matter in fait. Divorce,

The

In Treſpas *Quare clauſum fregit*, in the County of *D.* where the Treſpaſs was committed in the County of *S.* upon Not Guilty, if the Jury find the Defendant guilty in the County of *S.* their Verdict is void. But if they find him guilty generally, an Attaint lyeth. *Finch* 400. Becauſe this Treſpaſs is local; and what is local cannot be inquired of by men of another County, for they can have no Conuſans of it.

The Jurors of one County may find any tranſitory thing done in another County: nay ſometimes they muſt find local things in another County; as if the Heir pleads riens per diſcent, and the Plaintiff replies, Aſſets in a Pariſh and Ward within London, the Jury may find Aſſets in any County; the ſame Caſe againſt an Executor, who pleads plene adminiſtravit; the Jury may likewiſe find Aſſets in any part of the World. And the Reaſon is, becauſe the place is only named for neceſſity of Tryal. But where the place is part of the Iſſue, it is otherwiſe. And therefore if I promiſe in one place to do a thing in another, and Iſſue is upon the breach, the Jury ought to come from the place of the breach. But if I promiſe in London, to do a thing at Burdeaux in France, and Iſſue upon the breach, yet this ſhall be tryed in London for neceſſity, becauſe otherwiſe it would want Tryal, the Jury muſt enquire of the breach at Burdeaux. But if I promiſe in France to do a thing in France, ſo that both Contract and Performance is beyond Sea, this wants Tryal in our Law, Lib. 6. 47. Lib. 7. 23, 26, 27.

Of things done in another County or Country. *Vide cap.* 8.

Rolls tit. Tryal f. 571, 624.

In the Caſe of Drake and Beere. Trin. 15 Car. 2. B. R. this difference was agreed by the Court, viz. That a Jury in an Inferiour Court may inquire of things out of the Juriſdiction,

rification, if they be but for increaſe of Damages, as is 1 Cro. 571. Ireland verſus Blackwel; but if they enquire of any thing iſſuable out of that Juriſdictionis naught, 1 Cro. 101. 2 Cro. 503.

Error was brought to reverſe a Judgment given in the Palace Court, in Indebitat. for that the Defendant was indebted to the Plaintiff infra Juriſdictionem, for Nurſing of a Child, not ſaying the Nurſing was Infra Juriſdictionem. Juriſdiction of Courts.

Wadh. Windham Juſtice, held it good, for that it is a Debt every where, and not like a Debt that ariſeth by matter collateral: But Twiſden Juſtice doubted. Whitehead verſus Brown. Paſch. 15 Car. 2. B. R.

Vide Saunder's Report, 1 part 73. Peacock againſt Bell and Kendal. The Plaintiff declares the Defendant infra Juriſdictionem indebitatus fuiſſet to the Plaintiff in 39 l. pro diverſis Merchandizis per quer. eidem Defendenti ante tempus illud vendit. & deliberat. Held naught in an Inferior Court, for not ſaying ibidem vendit. &c. but good in a Superior Court, and in the County Palatine of Durham, for that is an Original and Superiour Court. Inferior Courts.

The Jury may find Eſtoppels, as the taking of a Leaſe of a Man's own Land, by Deed indented, or the delivery of a Deed before the Date, as in Debt by an Adminiſtrator, upon a Bond dated 4 Aprilis, 24 Eliz. The Defendant pleaded that the Inteſtate dyed before the date of the Obligation, and iſſint nient ſon fait, upon which they were at Iſſue, and adjudged that the Jury might find Eſtoppels.

When the Eſtoppel is found, the Court may judge according to the eſpecial matter.

find that the Bond was delivered the third of April, because they are sworn ad veritatem dicendam; though the parties are estopped to plead a Deed was delivered before the date; but they may plead a delivery after the date, because it shall never be intended that a Deed was delivered before the date, but after it may.

Estoppels. But if the Estoppel or Admittance be within the same Record, in which Issue is joined, then the Jurors cannot find any thing contrary to this, which the parties have affirmed and admitted of Record, though it be not true, for the Court may give Judgment upon matters confessed by the parties; and the Jurors are not to be charged with any such thing, but only with such in which the parties vary. Lib. 2. 4. Lib. 4. 53. Co. Lit. 227.

Decree. A Decree in Chancery, shall be tryed by a Jury, and not by it self; for it is not a Record, but a Decree recorded. The Chancery, as it is a Court of Equity, is not a Court of Record, but touching things agitated in the Petty-Bag Office, it is a Court of Record.

Exemplification. Exemplification of a Decree in Chancery, which has Bill and Answer, allowed good Evidence. Keb. 1 part 21. Deeds, &c.

Records not shewed. The Jury may find Deeds or matter of Record, if they will, though not shewed in Evidence. Finch 400. They may enquire of things done before the memory of Man. Lib. 9. 34.

The

The Jury in many Cases may find matters in a Forregin County, Conditions, Records, Releases, &c. As in Battery of the Plaintiffs Servant in one County and loss of Service in another County, this Damage in the other County may be inquired of by the Jury of the County where the Battery is laid. The like of Assets because Transitory, otherwise of a local Trespass, &c. Foreign County.

Nul tiel Record is not to be tryed by a Jury, but upon the general Issue, &c. they may find a Record.

The Jury may find a Warranty, being given in Evidence, though it be not pleaded: nay, the Jury may find that which cannot be pleaded; as in Trespass, upon not guilty, The Jury may find that the Defendant leased Lands for Life, upon Condition, and entred for the Condition broken; though this cannot be pleaded without Deed, yet the Jury may find it. Lit. Sect. 366. Warranty. Condition.

Where a collateral Warranty binds, this may well be given in Evidence: for although it doth not give a right, yet in Law this shall bar and bind a Right. Lib. 10. 97.

But this matter comes more properly under the Title Evidence; wherefore we will proceed to that.

See also in Chap. 13.

CAP.

CAP. XI.

Evidence and Witneſſes.

Evidence. EVidence, Evidentia: This Word in legal underſtanding (ſaith Co. 1 Inſt. 283.) doth not only contain matters of Record, as Letters Patents, Fines, Recoveries, Inrolments, and the like, and Writings under Seal; as Charters and Deeds, and other Writings without Seal; as Court-Rolls, Accounts, and the like, which are called Evidences, Inſtrumenta. But in a larger ſenſe, it containeth alſo Teſtimonia, the Teſtimony of Witneſſes, and other proofs to be produced and given to a Jury for finding of any Iſſue joyned between the Parties: and it is called Evidence, becauſe thereby the point in Iſſue is to be made Evident to the Jury: Probationes debent eſſe evidentes (id eſt) perſpicue & facile intellegi.

And this Evidence (with Bracton) we may term probatio duplex, viz. viva, as Witneſſes, viva voce; and Mortua, as by Deeds, Writings and Inſtruments; and Violenta præſumptio, in many Caſes, is plena probatio, and therefore if all the Witneſſes to a Deed be dead, then the Deed ſhall receive credit, per collationem ſigillorum ſcripturæ, &c. but eſpecially if there hath been a continual and quiet poſſeſſion; which is a violent preſumption. 1 Inſt. 6. for no Man can keep his Witneſſes alive.

Preſumption.

If a thing be generally referred to proof, this shall be intended proof by Jury; but if other manner of proof be agreed upon, that shall take away the proof which the Law generally intends by Jury, Hob. 127. As if I promise to pay what Mony you prove B. borrowed; this may be proved in the same Action brought upon the promise. Vide Rolls tit. Trial 594, 595. Proof.

In Felonies, &c. the persons that give Evidence for the Prisoner against the King are not sworn, but see Sidertin 211.

B. was Indicted for striking F. in Westminster-Hall, and the Witnesses that gave Evidence for B. were admitted to be sworn. Indictments.

And so the Defendants Witnesses in Appeal of Murder, 325. And the Court would not allow Evidence upon Oath, given upon the Indictment, although the Witness was dead; nor is Evidence upon the Indictment of Trespass, Evidence upon an Action of Trespass, ibid.

Upon Indictments and Informations concerning criminal Offences, as against a Justice for compounding of Recognizances, &c. Upon motion the Court will order the Prosecutor to give particular instances that the Defendant may know what to defend. Keble 2 part 220.

A Jew being a Witness is sworn on the Old Testament, and Perjury upon the Statute 5 Eliz. cap. 9. may be assigned upon this Oath; so if it be taken on the Common Prayer Book, that hath the Epistles and Gospel, Keb. 2 part 314. Hill. 19, 20 Car. 2. B. R.

Pen

Witneſſes.

Men that are ſo branded with Infamy, that they cannot be Jurors, (for which ſee before who may be Jurors) cannot be Witneſſes; yet per Glyn Chief Juſtice and Newdigate Juſtice, Mich. 1657. B. R. Conviction of common Barretry hinders not from being a Witneſs; but Maynard Serjeant, held ſtrongly againſt it.

At Lent Aſſiſes, Suffolk, 1657. St. John Chief Juſtice C. B. would not allow one who had been whipped for Petty Larceny, to be a Witneſs; but Earl Serjeant ſaid, they ought to be ſtigmatici that are diſabled from being Witneſſes: Yet per Roll Chief Juſtice, one burnt in the hand for Felony may be a Witneſs; for he is in capacity to purchaſe Lands, and his fault is purged by his puniſhment. Stiles 388.

Who may be Witneſſes.

The Wife cannot be a Witneſs for or againſt her Husband. 1 Inſt. 6. that is, in caſe of a common perſon, between party and party; but between the King and the party on an Indictment ſhe may, although it concern the Feme her ſelf, as in the Lord Audley's Caſe, Hutt. 116. So ſhe may have the Peace againſt her Husband.

In an Indictment proſecuted by the Husband, for ſeducing away his Wife, and keeping her ſome time in Adultery. The Wife was admitted to be a Witneſs againſt the Defendant, Coram Judice Windham, Lent Aſſiſes at Alesbury, and the Defendant was found guilty. She may be a Witneſs to prove a Cheat upon her and her Husband. Siderfin 431.

And

And so it was resolved in John Brown's Case, Trin. 35 Car. 2. B. R. on the Statute of 3 H. 7. cap. 2. vid. 1 Cro. 492.

The King cannot be a Witness by his Letters under his Signet Pennal: One attainted of Piracy cannot be a Witness to prove another guilty. If he accused another before he was attainted, and afterwards confesses he wronged him, this confession shall be rejected, because he is attainted. A Woman cannot be a Witness to prove a Man to be a Villain. Co. Lit. 6. 8.

Neither can the party to the usurious Contract, be a Witness against the Usurer, in an Information upon the Statute of Usury. But Kinsmen never so near, Tenants, Servants, Factors, Counsellors, and Attornies, &c. may be Witnesses. A Counsellor may be a Witness to the Agreement, &c. but not to validity of an Assurance, nor to the Counsel he gave. March, Rep. 43. If a Witness being served with Process, and having money sufficient to bear his charges, (or less, if he accept it) do not appear to give his testimony, he forfeits 10 l. to the party damnified, and must recompence his damages 5 Eliz. 9. If a Witness commit wilful perjury, he loseth 20 l. shall be imprisoned six Months without Bail, stand in the Pillory, and be disabled to be a Witness; so shall the suborner, who procures the Perjury. 5 Eliz. 9.

A party robbed is allowed a good Witness in his own Action against the Hundred, for he is not bound, nay is to be blamed, to tell any one what charge he carries with him;

But an Attorny cannot be a Witness against his Clyent for matters subsequent to his being employed.

any

and if he should not testifie, the Law would be often fruitless for want of Evidence, or else more Robberies committed by the parties discovering his Pony.

In the Case of Brereton and Tatam, Mich: 1656. B.R. Glyn Chief Justice, cited the Lord Chandoi's Case in this Court, where one Gates an Executor was produced to prove the Will, as a Witness, to which he (as Counsel) excepted, because of his Executorship. It was answered that he had fully administred: He replied, that Assets might afterward come to his hand; but the Court resolved that it would not be presumed to bar his Testimony, which was allowed in the principal Case, being in Ejectment.

It's no good exception to a Witness that he hath common pur cause of Vicinage in the Lands in question, because its but an excuse of Trespass, and no interest. Clapham's Case. Mich. 1657. B. R.

The same of common of Shacke.

If Obligee devises the Debt to the Obligor, and his Executors deliver up the Bond in satisfaction of the Legacy which is canceled, and after the validity of the Will is questioned, viz. whether the Testator was compos, &c. the Obligor is a good Witness for the Will, because by the cancelling of the Bond his Debt was discharged. But Contr. in Case of Mortgage, for though the Deed be cancelled, if it be no good Will, he must pay the Pony. Goodman vers. Turbervil. Mich. 1657. B. R.

An Action was brought by the Corporation of the Weavers of Norwich, for a Penalty against

against a Weaver for working at his Trade in Harvest time, contrary to an Ordinance by them made. And Atkins Justice allowed one of the Corporation to be a Witness, though one moiety of the Penalty was due to the Corporation. Lent Assise 1657.

In a Tryal at Bar, where an Estate for Life is limited to J. S. remainder to the poor of the Parish of Greenwich by Will; the Inhabitants of Greenwich, were allowed to be Witnesses to prove the Will. Townsend and Roan, Mich. 1658. B.R. Siderfin 2 part 109.

An Action of Debt was brought, Summer Assises Suff. 1669. by the Town of Ipswich, for 50 l. a Fine set upon one chosen Common Council-Man (called their prime Constable) for refusing to renounce the Covenant, &c. And the Town-Clerk (though a Freeman) was allowed a Witness to prove Election, Refusal, &c. and the Fine set, which is for necessity, for that none other are or ought to be present at those Acts. Rainsford Justice.

Per Hale Chief Justice, Norfolk Summer Assises 1668. A Freeman of Lynn is not an allowable Witness to prove the Custom of Foreign bought and Foreign sold in that Town, Harwich versus Twels.

As to Witnesses Priviledges.

One was Subpena'd ad testificandum, and prayed a Priviledge from being Arrested, which was granted, and per Cur. it will supersede an Arrest upon mean Process, but not upon an Execution; yet the Sheriff in that Case may be committed for his Contempt. Hen. Nevil's Case, Mich. 15. Car. 2. B.R.

Detaining of Witneſſes:

Sir Jo. Jackſon was Convict of an Information for preventing of Evidence to be given on an Indictment of Perjury againſt Fenwick and Holt, who had been Witneſſes for Sir J. J. he arreſted ſome Witneſſes, and gave mony to others, and ſo they were acquitted: He was fined one thouſand Marks, one Months Impriſonment, Behaviour for twelve Months. Hill. 1663. B. R.

Proof.

Proofs to determine matter of Fact, and to be offered to a Judge and Jury, are of two ſorts. First Living, as by Witneſſes, and to a Jury one Witneſs is ſufficient. And Dead, as matters of Record, as Letters Patents, Fines, Recoveries, Inrolments, &c. Writings ſealed and delivered; and Feoffments, Leaſes, Releaſes, &c. And without Seal, as Court-Rolls, Accounts, &c. And if the Caſe be between the King and a Priſoner, he is firſt to ſay what he can for himſelf, and then all that can ſay any thing againſt him are to be heard upon Oath, and then others may be heard for him, but not upon Oath: and according to this Evidence on both ſides, or without any Evidence at all, the Jury are to give their Verdict, according to their knowledge and Oath.

Such perſons as are Infamous, as are perſons attainted of Felony, or of a falſe Verdict, or of a Conſpiracy, or of Perjury, or of Forgery, upon the Statute of 5 Eliz. cap. 14. and not upon the Statute of 1 H. 5. 3. and ſuch as have had Judgment to loſe their Ears, or ſtand on the Pillory or Tumbrel,

bzel, oz have been ſtigmatized oz branded, and Infidels, Men not of ſound Memozy, oz not of diſcretion, oz ſuch as are intereſted in the Cauſe, oz have benefit, are not competent Witneſſes. Co. 1. Inſt. 6. but we ſee Jews are daily admitted Witneſſes.

The Jury are obliged to take cognizance of what is ſufficient Evidence, on pain of an Attaint, Evidence.

An account given to and allowed by the Ordinary, is not good Evidence; noz a Pedigree by a Herald at Arms, to pzove an Heir, but it muſt be pzoved by Deeds, Recozds, oz Witneſſes. *Plene adminiſtravit.* Pedigree.

In Debt againſt an Executoz, ſuggeſting a Devaſtavit, any Evidence that pzoves Aſſets, is not ſufficient, but an actual Devaſtavit muſt be pzoved, foz now the party is chargable in his own right; Keble 2 part, 676. *Devaſtavit.*

If the Iſſue be a Recognizance oz not, a Recognizance with a Defeazance is good Evidence. Plo. 14. So of an Agreement, a ſpecial Agreement will pzove it. Plo. 8. Recogniſance. Agreement.

A Licence to alien Land, oz a pardon foz alienation of Land, was held by a common pzeſumption, to be a good pzoof that the Land was held in capite. Tenure in *Capite.*

A thing which is concluded in the Eccleſiaſtical Court, which doth concern Lands, is not to be given in Evidence; foz the Courts of Common Law are not to be guided by their pzoceedings. Eccleſiaſtical proceedings.

Ancient Deeds may be given in Evidence, although the execution of them cannot be pzoved. Ancient Deeds.

An Ancient Deed found in the Archives of the

Vicar. Ednowment. Dean and Chapter, given in Evidence to prove the Endowment of the Vicar, though it appeared never to be sealed or delivered, Keble 2 part, 126.

Payment time out of mind, is good Evidence of an Endowment. 729.

Copy of a Record. He that takes out a Copy of part of a Record, must at least take out so much as concerns the matter in question, or else the Court will not permit it to be read.

Outlawry. If one produce a Lease made upon an Outlawry, in Evidence to a Jury to prove a Title, he must also produce the Outlawry it self.

Feoffment. To prove a Feoffment, a Deed of Feoffment is shewed, but no Livery is Indorsed, if possession has gone with the Deed, it is good Evidence. Rolls Rep. 1 part, 132.

Proviso. Upon Not Guilty to an Information upon a penal Law, a Proviso to excuse him may be given in Evidence, Jones Rep. 320.

Non decimando. If a Man prescribe in a non decimando generally, he cannot give a Bull in Evidence, Palmers Rep. 38.

Deed. A Deed with the Seals torn off was admitted to declare Uses. Palmers Rep. 403, 405.

Records. Records prove themselves, and cannot be proved by Witnesses; but Copies of them must, and are good Evidence and so may any thing done in the County-Court, Court-Baron, or Hundred-Court, &c. be proved by Witnesses.

A Copy of a Conviction upon an Indictment of Trespass &c. shall not be admitted evidence singly by it self, in an Action of Trespass, &c. but with Evidence it shall.

A

A Fine or Common Recovery, may be given in Evidence, though it be not under the Great Seal, or Seal of the Court, and without vouching the Roll of the Recovery; and the part indented is the usual Evidence that there is such a Fine, though they which saw the Fine, are also good Evidence, Plow. 410. Stiles 22. Fine.

When a Writ out of a Court of Record is only inducement to an Action, the taking out the Writ may be proved without Copy of it, for it is not of Record till it be returned. And so I think it may to prove the Point in Action, by Witnesses or Notes of it in a Book of Entries, &c.

Depositions in the Ecclesiastical Court connot be given in Evidence, though parties be dead. March. 120. A Defendants Answer in an English Court, is good Evidence against him, but not against others, Godbolt 326. Where the Evidence proves the effect and substance of the Issue, it is good. By Order of Court the Depositions taken of a Sick Witness may be given in Evidence. Depositions.

I cannot make use of Depositions in a Cause wherein I was not a Party, for as they cannot be read against me, no more can they be read for me, because I am not bound by them, nor in a capacity of examining Witnesses in it, or preferring Interrogatories. And 'tis not like the Case of an Ejectment brought by a Reversioner, or Debt upon the Statute of Ed. 6. brought by a Proprietor of Tithes, after a Verdict at Law, for the Lessee or the present

proprietor, the Reverſioner of the Lands or Tithes ſhall have advantage of the Verdict, and give it in Evidence; and the reaſons are, becauſe they cannot be immediate Parties to the Action or Suit, for that muſt be proſecuted by the Leſſee or preſent Tenant, and they may give in Evidence as well as the Plaintiff himſelf; but it is otherwiſe in caſe of Depoſitions, for there only Parties to the Suit can examine or interrogate; likewiſe the Reverſioner or Seigniorels, (whole Tenants were only Parties in the former Suit) might themſelves have been made Parties in a Suit in Equity. The Counteſs of Pembrokes Caſe, Hardres Rep. 472.

The Depoſitions of a Witneſs taken before anſwer, to preſerve his Teſtimony who dieth after Anſwer, ſhall not be given in Evidence, although he continued ſo ſick that he could not be examined after Anſwer Hardres Rep. 315.

Depoſitions in Chancery of Witneſſes that are dead may be read at the Aſſiſes betwixt the ſame Parties, proving the Bill and Anſwer.

See Keeble 2 part 31. An old Exemplification of Depoſitions in Chancery given in Evidence, although the Bill and Anſwer were not in it, for above forty years ſince 'twas not uſual to inſert Bill and Anſwer.

The Anſwer of one Defendant is not Evidence againſt another Defendant.

If Witneſſes are examined de bene eſſe before Anſwer upon a Contempt, ſuch Depoſitions cannot be made uſe of in any other Court,

Court, but in the Court only where they were taken; the reason seems to be, because there was no Issue joyned, so as there could be a legal Examination, and they were only taken to be read in the Court in which they were taken, upon a Contempt to that particular Court, Hardres Rep. 332.

Summer Assizes, 1683. before View in Escape upon a Judgment, and Ca.sa. in the Court of the Dean and Chapter of Peterburrough being an Inferior Court of Pleas, the Plaintiff was non-suited because he had not a Copy of the Plaint nor Judgment, but only the short Notes of the Book of the Court. Aliter in Court Baron, &c. *Bevis against Holloway.*

Upon plene administravit, if it be proved that the Executor hath Goods of the Testators in his Hands, he may give in Evidence, that he hath paid of his own Mony for the Testator, to the value of these Goods, Co. Lit. 283. Dyer 2. Assets.

The Plaintiff may say, he sold the Land by the appointment of the Testator, 3 H. 6. 3.

So if a Lease be pleaded, a Lease upon Condition is good Evidence, 1 H. 8. 20. because the Genus comprehends the Species. So of a Feoffment pleaded, a Feoffment upon Condition, or a Fine which is a Feoffment of Record, is good Evidence, 44 E. 3. 39. A special Agreement is evidence for an Agreement, Plow. 8. Lease.

But if a Feoffment be pleaded in Fee, upon Issue non feoffavit modo & forma, a Feoffment upon Condition is no Evidence, because Feoffment.

because it doth not answer the Issue; and wheresoever Evidence is contrary to the Issue, and doth not maintain it, the Evidence is not good, 11 H. 4. 3. Feoffments 41. A Grant in Reversion is no Evidence, but a Lease and Release is, 20 H. 7. 5. If the Inrolement be of a Livery by Attorny, the Letter of Attorny must be shewed.

Assumpsit. Upon an Assumpsit to the Husband, an Assumpsit to the Wife and his Agreement is good Evidence, 27 H. 8. 29. Upon Non Assumpsit to a special promise, payment is no Evidence by three Judges.

Challenge. In Challenge to the Array, because made at the denomination of the Sheriffs Clerk, Evidence at his Bailiffs denomination, is good, because favourably made is the substance, 38 H. 6. 9.

Assets. If the Issue be in a Suit against an Executor, Administrator or Heir, Assets in London; to prove Assets in another place is sufficient, Lib. 6. 47. Dyer 271.

Accompt. Accompt pleaded before two; Accompt before one is good Evidence, Hob. 55. because the Accompt is the substance.

What Evidence upon the General Issues. Upon the General Issue the Defendant may give any thing in Evidence, which proves the Plaintiff hath no cause of Action, or which doth intitle the Defendant to the thing in question.

But if he hath cause of justification or excuse, it must be pleaded; wherefore upon non detinet in detinue, the Defendant may

Detinue. give in Evidence a Gift from the Plaintiff; for that proveth that he doth not detain the Plaintiffs Goods; but he cannot give in Evi-

Evidence that the Goods were pawned to him for Money, and that it is not paid, but he muſt plead it, 1 Inſt. 283. For the property is in the Pledger.

Upon Not Guilty in Battery ſon aſſault demeſne, is no Evidence; for thereby the Battery is confeſſed, Ibid. Neither is Not Guilty good Evidence upon ſon aſſault demeſne. In Battery.

Upon Not Guilty in Treſpaſs, Inſufficiency of the Plaintiffs Bounds, or to juſtifie for a Rent-Charge, Common, Licence, ſon aſſault demeſne, or the like, is no good Evidence, Ib. But to prove a Treſpaſs before or after the day laid in the Declaration is good to maintain the Action, 1 Inſt. 283. Treſpaſs. Miſtake of the day in an Appeal is not material upon Evidence.

So upon the Plea, nul Waſt fait, in an Action of Waſt, he may give in Evidence, any thing that proveth it no Waſt, as by Tempeſt, by Lightning, by Enemies, &c. But he cannot give in Evidence any juſtifiable Waſt, as to repair the Houſe or the like; nor a reparation of the Waſt, before the Action brought, Ib. For the Rule is, That the Evidence muſt ſtand and agree with the Iſſue. Waſte.

Upon non eſt factum 'tis no Evidence to ſhew the Bond that was made upon an uſurious Contract, or that the Sheriffs Name is miſtaken, &c. in a Bail-Bond; or that the Bond is joynt or ſeveral, or delivered at another place; or that it is void by Statute, But it muſt be pleaded in Abatement, Ib. Hob. 72. *Non eſt factum.*

But

But to prove that the Seal was broken off, and put on again; or to prove a Razure of the Deed, delivered as an Escrow, &c. this is good Evidence, Li. 5. 119. 11. 27. if 'twere done before the Action brought; but if the Seal was broke off, &c. by chance, after Issue joyned, the Jury may find it specially.

To prove the sealing and delivery of a Deed, and not know the party that did it, is not good Evidence; but if he knows the party upon sight of him it is good enough, Kelw. 59.

Trover. Upon Not guilty, in Trover and Conversion, a Demand and denial of the Goods, is good Evidence, and an actual taking is good Evidence of the Conversion; but where the Goods come to the Defendant by Trover, there must be an actual demand and denial, Plow. 14. li. 10. 57. Cro. 1 part, ult. pub. 495. Hob. 187. More 460. Abridg. Rolls 5.

Plene administravit. But an Outlawry of the Testator is Evidence upon *Plene administravit*, Keble 2 part, 745. Debt for Rent Upon Plene administravit, the Executor cannot give a Judgment in Evidence, Kelw. 59. nor payment of Debts by Contract, in Debt brought upon an Obligation. A Cup pawned and redeemed with the Executors own Mony, is good Evidence; but a Recovery ought to be pleaded; upon nil debet, in Debt for Rent, That the Lessor entred into part of the Land, is no good Evidence, Gold. 81. But non demisit is, 9 H. 7. 3.

Parco fracto. Upon Not Guilty, in an Action upon the Statute de parco fracto, That the Plaintiff hath no Park, is good Evidence, 19 H. 8. 9.

So

So upon Not Guilty in Treſpaſs, in the Plaintiffs Warren, Evidence that he hath no Warren is good, 10 H. 6. 17. Kitchin 119. Warren.

A Shop-book no Evidence after a Year, 7 Jac. cap. 12. Shop-books.

In Debt for Arrerages of an Accompt upon Nil debet modo & forma; No Accompt is good Evidence, 2 H. 6. 26. Upon Not Guilty in Treſpaſs, a Leaſe for years, 12 H. 8. 2. or that locus in quo, &c. is the Freehold of another, 4 E. 3. 45. is good Evidence; and ſo of a Gift of Goods; but upon this he cannot juſtifie his Entry upon the place by a Strangers Licence, or Command, Br. General Iſſue 81. becauſe this is a Juſtification by way of Excuſe; Neither is a Leaſe at Will good Evidence in this Caſe. Accompt. Treſpaſs.

So upon Not Guilty, in Treſpaſs for Goods, 'tis good Evidence that the Goods were a Strangers, 9 H. 6. 11. But that they were a Strangers, and that he as a Servant to the Stranger, or by his commandment, took them from the Plaintiff, is not good, Br. General Iſſue 81. becauſe the Treſpaſs is confeſſed. But that the Stranger gave them to the Defendant is good, 9 H. 6. 11. In Treſpaſs the Buttals muſt be proved as they are laid. Not Guilty in Treſpaſs.

If the Defendant plead payment to a Bond or Will, and it appears the Debt is very old, and it hath not been demanded, nor any Uſe paid for many years, Common Preſumption is good Evidence, that the Mony is paid, and the Juries Payment by Preſumption.

uſe

uſe to find for the Defendants in ſuch Caſes.

Eſcape.

In Debt upon an Eſcape, if the Defendant plead nul Eſcape, he cannot give in Evidence no Arreſt.

Treſpaſs another day.

If the Treſpaſs were in truth done the 4th of May, and the Plaintiff allegeth the ſame to be done the 5th of May, or the firſt of May, when no Treſpaſs was done; yet if upon Evidence, it falleth out that the Treſpaſs was done before the Action brought, it ſufficeth, 1 Inſt. 283.

And ſo in Indictments, 3 Inſt. 230.

Deed.

'Tis dangerous to permit Evidence to a Jury by Witneſſes, that there was ſuch a Deed, which they have ſeen or read, to prove the Deed by a Copy, becauſe the Deed may be upon Condition, Limitation or power of Revocation; and if this ſhould be permitted, the whole Reaſon of the Common Law, in ſhewing Deeds to the Court, would be ſubverted; for the Deed might be imperfect, and void, which the Witneſſes could not perceive; yet in Caſes of extremity, as where the Deed was burned, or loſt by ſome other notorious accident, the Judges may at their diſcretion, allow them to be proved by Witneſſes, lib. 10. 92. and ſo of a Record.

Keble 2 part 546. Inſtances of a Copy not examined, allowed and diſallowed in Evidence; but I think unleſs the Witneſs ſwear that he remembers the Contents of the Deed, and that they are as the Copy is, the Copy ought not to be allowed Evidence unleſs examined.

Executor.

In Caſe againſt an Executor; whereas the Teſtator was indebted to the Plaintiff, the Executor promiſed to pay the Debt, in conſideration the Plaintiff would forbear to ſue him; the Executor may give in Evidence upon Non aſſumpſit, that there was no Debt, or that he had no Aſſets tempore pro-

promiſſionis, for then there would be no Conſideration, Lib. 9. 94. William Bane's Caſe upon the Iſſue ne unques Executor to prove an Adminiſtration granted to him, is good Evidence, Dyer 305.

Ne unques Executor.

In Trover brought by an Executor, the Defendant pleaded ne unque Executor. The Defendant ſhall not give in Evidence that the Will was forged, becauſe the Will was under the Seal of the Ordinary, to whoſe Examination it belongs, as to Goods; but Forgery of the Probate, or a Revocation, may be given in Evidence, becauſe theſe things are in Affirmance of the Spiritual Proceedings, ſo of an Adminiſtration, that there are bona notabilia, may be given in Evidence, but not Non compos mentis, Siderfin 359. Keb. 2 part 337.

Spiritual Courts.

Evidence ſhall never be pleaded, but the Matter of Fact ſhall be pleaded, and if it be denied, the Evidence ſhall be given to the Jury, not to the Court, Lib. 9. 9.

Evidence.

Evidence, that the Wife of every Copyholder, ſhall have the Land durante viduitate, will not maintain the Iſſue, that the Cuſtom of a Manor is, That ſhe ſhall have the Land during her Life, after her Husbands death, becauſe, though durante viduitate, imports an Eſtate for Life, yet an Eſtate durante vita, is more large and beneficial, Lib. 4. 30.

Eſtate for life.

Things done before the Memory of Man in another County, or in another Kingdom, may be given in Evidence to a Jury, as Aſſets in another County, &c. More 47. See Lib. 4. 22. 9. 27, 28, & 34. Lib. 6. 46, 47.

What may be given in Evidence.

Upon

Payment. Upon Iſſue payment at the day; payment before or after the day is no Evidence. More 47. but upon Nil debet, it is good Evidence, becauſe it proves the Iſſue.

Covin. Upon Iſſue Aſſets or no Aſſets, or ſeiſed, or not ſeiſed, if one give a Feoffment, &c. in Evidence, Covin may be given in Evidence, by the other, but not if the Iſſue be infeoffed or not infeoffed, for it is a Feoffment tiel quel, though made by Covin, Lib. 5. 60. Hob. 72.

Voluntary Conveyance. A voluntary Conveyance is not fraudulent, becauſe voluntary, but 'tis Evidence of Fraud againſt an after Purchaſer bona fide; the Statute avoids ſuch Deeds as are bona fide, and on Conſideration if made ex intentione to defraud Purchaſers, therefore this Fraud muſt be found by the Jury, Keb. 1 part 486.

Doomesday-book. The Book of Doomſday brought in Court, is good Evidence to prove the Land to be ancient Demeſne, Hob. 188.

Attaint. In Attaint, the Plaintiff ſhall not give more Evidence, nor examine more Witneſſes, than was before, but the Defendant may, Dyer 212.

Court-Rolls for Copy-holders. Copies of the Court-Rolls, are the only Evidence for Copy-holders, for (as Littleton, Sect. 75. tells you) they are called Tenants by Copy of Court-Roll, becauſe they have no other Evidence, concerning their Tenements, but only the Copies of Court-Rolls. But Cook explains the Text, and

Recoveries are ſome Evidence that the Manor bears an Intail of a Copyhold, but to ſhew that Remainders (after an Eſtate Tail ſpent) to be enjoyed is a better.

ſays,

says, This is to be understood of Evidences of Alienation; for a Release of a Right by Deed, a Copy-holder (that cometh in by way of admittance) may have, and that is sufficient to extinguish the Right of the Copy-holder which he that maketh the Release had.

In Actions upon the Case, Trespass, Battery or False Imprisonment against any Justice of Peace, Mayor or Bailiff of City or Town Corporate, Headborough, Portreve, Constable, Tithingman, Collector of Subsidy or Fifteen, in any of his Majesties Courts at Westminster, or elsewhere concerning any thing done by any of them, by reason of any of their Offices aforesaid, and all other in their aid or assistance, or by their Commandment, &c. They may plead the General Issue, and give the Special Matter of their Excuse or Justification in Evidance, 7 Jac. cap. 5. Specipal Evidence upon the General issue, by whom.

General Acts of Parliament may be given in Evidence, and need not be pleaded; and so may General Pardons given by Parliament, if they be without Exceptions; But commonly advantage of the Act is given by the Act it self to the Offender, without pleading it, as by the late (most truly so called) general Act of Indempnity, every Person thereby pardoned, may plead the General Issue, and give the Act in Evidence, for his discharge: Which are general, and which particular Statutes, See lib. 4. 76. Statutes. Pardons.

A private Act may be given in Evidence exemplified under the Great Seal, or a Copy of the Record; but a printed Copy is no Evidence unless it be proved, it ought to be pleaded, but the Jury may find it, Dyer 239.

Trover. Upon Not Guilty in Trover, the Defendant may give in Evidence, that the Goods were pawned to him for 10 l. That he distrained them, for Rent, or Damage-feasant: That as Sheriff, he levied them upon Execution, or that he took them as Tithes severed, Cro. 1 part, 157. 3 part, 435. Hob. 187. A demand and denial of the Goods is Evidence of a Conversion.

If there be two Trespasses, and the Defendant plead a Justification; if the Plaintiff replies, *de injuria sua propria*, &c. he cannot give in Evidence a Trespass at another time; But he should have replied, that at another time, in the same day of his Count, the Defendant did the other Trespass, *&c.* to which the Defendant may plead another Justification, but the Plaintiff cannot then plead a Trespass at another time, but must conclude *Sans tiel cause*, &c. *vide apres.*

If there be two Batteries between Plaintiff and Defendant, at divers times, the Plaintiff is bound to prove the Battery made the same day in the Declaration, and shall not be admitted to give another day in Evidence, as the Case may be: As in Battery the Defendant pleaded, Son assault demesne, and the Plaintiff replied, De injuria sua propria absque tali causa, and in Evidence, the Defendant maintained, that the Plaintiff beat him the day mentioned in the Declaration, and in the same place, which the Plaintiff perceiving, he gave in Evidence, that the Battery was

made

made another day and place, to which the Defendant demurred, upon the difference aforesaid. Brownlow 1 part, 233. 19 H. 6. 47. But upon not Guilty, it is otherwise, though there be never so many Batteries between the Parties. Littleton Sect. 485.

Prohibition for suing for Tythes in Bocking-Park in Essex, and surmised, that the Lands were parcel of the Possessions of the Priory of Christs-Church in Canterbury, and the said Prior and his Predecessors had held it discharged of Tythes tempore dissolutionis, and pleaded the Statute of 31 H. 8. The Defendant pleads that the Prior and his Predecessors did not hold them discharged, and upon Issue joyned thereon, the Evidence was, That the Prior or his Predecessors, time out of mind, &c. never paid Tythes; but no cause was shewn, either by unity of Possession, real Composition, or other cause to shew it discharged: Cook said it was no Evidence, for it is a Prescription in non decimando. Curia contra; for a Spiritual Man may prescribe in non decimando, and by the Statute of 31 H. 8. he shall hold it discharged as the Prior held it; and if he held it discharged, non refert, by what means; for it shall be intended by lawful means, and the Jury afterwards found it for the Plaintiff. Cro. 3 part, 2, 6. Keble 2 part, 45.

A non decimando.

In *nil debet*, upon the Statute for Tythes, a Lay person cannot give a *non decimando* in Evidence; so may the King, and any other spiritual persons. li. 2. B. of *Winchesters* Case.

Upon non assumpsit, in a general Indebitatus assumpsit, the Defendant may give in Evidence, payment at any time, before the Action brought, but upon a special promise

Indebitatus assumpsit.

to pay Mony, &c. it is otherwise, Causa patet; for in the first Case, if there be no Debt the Law will infer no promise.

A Church-Book is no Evidence. *Brownlow* 1 part 207. Postea 26. Assise pl. 4.

If a Church-Book, or any thing else be given in Evidence, which ought not to be allowed, the Court above cannot quash the Verdict, except it be certified and returned with the Postea. Brownlow 1 part, 207. But the Court may order a new Tryal, upon cause shewed, as for excessive Damages, &c.

The Court will not permit the Jury to carry any Writings out with them, but what are proved, and under Seal.

But here I recollect my self, and consider that this Chapter is of greatest use to our Circuit Practiser, and therefore I shall go no farther in scatter'd Instances, but digest my farther Collections into a Method more beneficial, which may be improved by any Practiser, as other matter shall occur.

Action of the Case.

Quare defendes Crimen feloniæ ei imposuit, &c. The Plaintiff cannot give in Evidence words only, but acts, as arresting, charging or conventing him before Justice of Peace for Felony. Sanders versus Edwards, Mich. 14 Car. 2. B. R.

If any Action arises on request, as in Trover or special Promise, the Statute of Limitation goes only to the request. Juy's Case, Mich. 1562. C. B. 1 Cro. 139.

Declaration for Words spoken in the presence of A. B. and others, in Evidence it sufficeth that they were spoken in the presence of others only. Winckfield and Coot,

Lent

Lent Assises Norfolk, 1662. per Hale Chief Baron.

In Indebitatus for carrying of Herrings; the Evidence was, he was a Porter at Yarmouth, and when Herring-Ships came home, he went (of his own head) and carried up to the Defendants House, with other Porters, so many Herrings; and good by Twisden Judge of Assise, Norf. Summer 1662. Jermin vers. Lucas.

In Action for hindring to sit in a Pew, claimed by prescription, repaired, &c. ought to be given in Evidence; and one may prescribe to sit in the uppermost Seat in a Pew. Buckston and Bateman, Mich. 14 Car. 2. B. R. Pew. Keble 2 part, 342.

In Action for executing an Illegal Warrant, &c. It's good Evidence to prove the Justice of Peace acted as such, without shewing his Commission; so on the Statute of Hue and Cry, Constable's Case. Norf. Lent Assises, per Hale Chief Baron.

Action for stopping up lights, &c. One had a piece of Ground and builds an House on part, and Leases it, then he sells the other part of the Ground to one who builds on it, and stops up the lights of the first House, the Lessee has a good Action. But if two owe two pieces of Ground, and one builds, the other may also build and stop up his lights. Palmer versus Flesher, Mich. 15 Car. 2. B. R.

If a Master always gives his Servant Mony to buy his Markets with, it is good Evidence to discharge the Master in an Action brought against him for Goods taken up Master.

on Truſt, by that Servant. Per Glyn Chief Juſtice, Mich. 1658. at Guild-Hall, Sir Tho. Rouſes Caſe.

Maſter. The Maſter declared, That the Defendant dug a Pit, and as he was driving his Horſe, he fell in the Pit, &c. To prove the Servant drove the Horſe doth not maintain the Declaration. Stiles 335.

A Water-courſe runs though my Grounds to the Grounds of J. S. where is a Pit that time out of mind uſed to be filled with that water, I may ſtop the water in my Ground, and uſe it as I will, ſo I do not turn the courſe another way, but when I have done with it, let it fall into its own courſe. Per St. John Chief Juſtice, C. B. Suff. Summer Aſſiſes, 1657. Smart and Tyſtead.

Action for words, You forſwore your ſelf in your Anſwer in Chancery. Defendant juſtifies. Plaintiff replies, de injuria ſua propria abſque tali cauſa. Per Hale Summer Aſſiſe Suffolk, It's a good replication, and a ſmall miſtake in an Anſwer ſhall not convict of Perjury, for the Councel may miſtake or his Clerk.

Action for not ſcouring a Ditch, by which the water overflowed his Land, &c. and declare quod quidam Rivus ran there, &c. Upon Evidence it appeared only a Land-flood, and good by name of Rivus, though it be dry great part of the years, and it was held the beſt pleading of the courſe of this river to put a place from whence it comes, and ſo to the Plaintiffs Land, without mentioning mean places by which it paſſes, which may by many,

many, and must be proved if laid, Per Whitfield 1641. York. Clayton 96.

Souldiers lying in an Inn fourteen days, are Guests within the Custom of England Harland's Case, per Whitfield, 1647.

The Plaintiff in Action of the Case intitles himself by Prescription, to a Fold-course for Sheep upon all the Lands in such a Field on Michaelmas day, and so to Lady day, the Lands being unsown, and for that the Defendant put on Sheep, &c. before Michaelmas day and after, and thereby fed the Grounds, &c. the Plaintiff could not take so good feed, actio inde.

1. The Owner may put on Sheep and feed his own Grounds before Michaelmus, unless a Custom be to the contrary, which ought to be laid in the Declaration. Contra of a Stranger.

2. If appearing that part of the Lands, &c. had been the Lands of the Plaintiff, who was Lord of the Manor, and prescribed as such, and there being no exception of those Lands in the Prescription, the Plaintiff was non-suit; for as to those Lands the Prescription is gone by unity of Possession. Per Hale Chief Baron, Norfolk, Summer Assises, 1668. Branthwait versus Hunt.

Assumpsit.

In Indebitatus, Covenant to pay is no Evidence, 2 Cro. 505. Nor Mony due for Rent by Specialty, or on Record. Hob. 284. Hutt. 35.

But an Account ſtated for Rent and other things, is good Evidence.

Baron and Feme.

Indebitatus aſſ. againſt Baron for neceſſaries for his Wife, they muſt be according to his Eſtate, as well as degree. Siderfin 128. If ſhe doth not cohabit with him the Action doth not lye. If the Goods bought by the Wife or Servant come to the uſe of the Husband, although this be no binding Evidence, yet this preſumptive Evidence ſhall charge him.

He may forbid one or two, &c. to let her have Goods, but a general forbidding alſo is void. Keeble 2 part, 554.

Infancy.

Per Hale Chief Juſtice, deins Age may be given in Evidence on non aſſumpſit, in an Indebitatus aſſumpſit, Keebles 2 part, 851. Painter and Bowman's Caſe.

In Indebitat. not for Mony, &c. delivery of Corn or other matter in ſatisfaction, is good Evidence. Contra in a ſpecial Action of the Caſe on Aſſumpſit. Vide Keeble 3 part, 18.

Indebitatus lyes for Mony won at Dice, Wiche's Caſe, Hill. 14, 15 Car. 2. B. R.

If a promiſe be made to pay at a day certain, and the day is paſt, the Plaintiff may declare to pay on requeſt: ſo if he declare on payment at a day certain, and give in Evidence a promiſe on requeſt, i. e. when it is created on account which gives the duty, for there the time is ex abundanti; but where the Action is founded on the Contract, otherwiſe, for there the Evidence muſt purſue the Contract. Hill. 1650. B. R. Child's Caſe

Upon

Promise to restore a Horse hired for a Journy, if the Horse dies in the Journy without the Riders default, his promise binds not. Lisle's Case, cited in Matraver's Case. Trin. 1651. B. R.

One brings an Assumpsit for 20 l. and gives in Evidence a promise if two would surrender to pay them 20 l. a-piece, good. Mich. 1655. B. R. Thomas and Gerey.

Indebit. for 50 l. brought by Edgar against Chetham Clerk. The Evidence was, T. was indebted to Edgar in 50 l. Chetham desires Edgar to let him take the 50 l. of T. and he would give Edgar a Bill of Exchange to receive so much at London: accordingly T. promises to pay Chetham the Mony, which promise he accepted, and gave a Bill of Exchange to Edgar; after T. became insolvent, then Chetham prohibits the payment of his Bill, whereupon this Action is brought. Per Wadh. Windham Justice Assise, Norfolk Summer, 1663. The Action lies, for Chetham having accepted the promise of T. and given a Bill, &c. is now become a debtor to Edgar, until his Bill be paid, though he never receives the Mony of Thomson.

In Indebit. it is good Evidence against the Father, that Physick was delivered to his Daughter at his request, Stonehouse versus Bodvil, Hill. 14 Car. 2. B. R.

One promises a Bailiff, that if he would let one arrested be in his House that night, he would deliver him in the morning, its a good promise, and the Bailiff or the Plaintiff may bring the Action. Benson vers. French Pasch. 15 Car. 2. B. R.

In-

Indebitat. The Case was, the Plaintiff sold sixty Comb of Rye to the Defendant at fourteen Shillings per Comb, to be delivered before Michaelmas, the Plaintiff delivered fifty Comb before the time, and brought this Action for the Mony for it, and good, though it was agreed the Mony to be paid on the delivery of the last Rye. Per Hale Chief Baron.

1. Though the Agreement is intire, yet the several deliveries make several Contracts.

2. Though the payment was to be on the last delivery, yet a time being set for delivery, it's intended to be paid when the delivery should have been.

3. The time being past, its now a duty, and so Indebitatus lies.

4. The Defendant hath his remedy for delivering the residue. Barker versus Sutton, Lent Assise Norf. 1662.

The Court would not admit Evidence of
nunt. account current to maintain Indebitatus, because 'twould involve the Court in a tedious examination; but if the Account had been stated, then Indebit. upon the Account is usual. Keb. 2 part 781.

Indebitatus Assumpsit pro opere, or pro diversis mercimoniis, or pro servitio, or labore, is good, and the particulars may be given in Evidence; otherwise of an Indebitatus generally, or pro multis beneficiis, &c. Keble 3 part, 781. Keble 2 part, 552.

Indebitatus lies for a Portion after the Joynture setled; so for a thousand pounds, on promise of so much for every Horse-

Shoe

Shoe Nail, but the Jury may mitigate Damages. Ib.

A promise to Marry B. within three Months, within a fortnight after they meet, and the party promises again to Marry her within three Weeks, this last promise is no discharge of the former, being all within the time of three Months; but had the last promise been to Marry her within some other time after the three Months, it had discharged the former. Hite versus Chaplin. Pasch. 1658. B. R.

Indebitatus by one, Defendant gives Evidence that another was Partner with the Plaintiff at the delivery of the Wares, Plaintiff Non-suit. Franklin versus Walker, Norf. Lent. Assise 1667. Per Moreton. Contr. in Trespass, for there Joynt-tenancy must be pleaded.

In Assumpsit in Fact, and non Assumpsit pleaded, a Release cannot be given in Evidence, unless only to mitigate Damages; but it may upon an Assumpsit in Law, to maintain non Assumpsit.

Indebitatus for 9 l. Defendant pleaded non assumpsit infra sex annos, Issue inde, the Plaintiff proved a Debt of 9 l. due ten years before, and an acknowledgment of the Debt within six years, and an offer to pay 5 l. for the whole.

Per Hale, The Plaintiff Non-suit; for the acknowledgment of the Debt is no more than is done by the Plea, but there must be a new promise of the Debt within six years, to make the Action hold, and here the promise or offer to pay 5 l. gives no Action

for

for the 2 l. Bass versus Smith, Suffolk, Summer Assize, 1668.

Debt.

Debt on a Bond to perform Covenants, to deliver possession at the Terms end to the Lessor, or his Assigns; breach was assigned in not delivery to two Purchasors, demand being made by both, and Issue joyn'd thereon, in Evidence demand by one is good. 2 Cro. 475.

Nil Debet. In Debt upon a Contract, that the Contract was conditional upon Account, that there was no such Account, ne lessa pas upon nil debet, in Debt for Rent.

In Debt upon the Statute of 21 H. 8. of Farms, upon the general Issue non habuit he may give in Evidence the taking for the provision of his House, according to the Proviso of that Statute, 27 H. 8. 21.

Debt on Bond to perform an Award, ita quod the Award be delivered to the parties in Evidence, delivery proved to the Wife, is sufficient for the Jury to presume the delivery to the party himself, Per Hale Norfolk Summer Assises, 1665. Trice and Prat.

At the same Assises, Per Moreton Justice, delivery to the parties Son is good Evidence, Violet and Cook.

Debt against an Heir, &c. riens per descent, &c. a Feoffment given in Evidence made before the Action that it was fraudulent may be given in Evidence, though not pleaded

pleaded. 5 Rep. Co. Gooches Caſe 60. Hob. 72. Vide Fitz. Tit. Garranty 88.

Debt againſt Executor, who pleaded Ne unques, &c. Plaintiff replyed, that he adminiſtred as Executor, and gave in Evidence Adminiſtration granted to him by which he adminiſtred, good. Dyer 305. But a Gift of the Goods the Defendant may give in Evidence.

In Debt againſt Executors, and plene adminiſtravit pleaded, the Defendant cannot give in Evidence a Bond ſatisfied, where the Executor and Teſtator were Obligors, per Coventry Lord Keeper, 33 Eliz. Perkins verſ. Perkins.

In Debt for Tithes, Modus to a Vicar is good againſt the Parſon, and ſo is a Modus to a Pariſh Clerk. Per Moreton Juſtice, Lent Cambridge, 1667. Barber verſus Coſier.

In Debt againſt Executor de ſon tort, who pleads Ne unques, &c. It is ſufficient to charge him, by proving he hath adminiſtred of never ſo little value. Clayton 6.

Againſt Executor de ſon tort, who pleaded fully adminiſtred, the Evidence was, the Inteſtate made a Bill of Sale of his Goods to the Defendant; who was bound with him in a Bond as ſurety, for his Counter-ſecurity, but the Goods remained in the Inteſtates poſſeſſion during his Life, for ſome few hours; ruled a fraudulent Deed by Barkly Juſtice, at York. 11 Car. Legard and Linley. Clayton 39. Quære.

Debt

If the Defendant pleads *plene*, &c. *præter* Judgments &c. The Plaintiff must prove Assets above the Sum of those Judgments. *Huntington*, by Judge *Windham*, 33 *Car.* 2.

Debt against Administrator, who pleaded plene, &c. and gave in Evidence Judgment, and good without pleading, per Henden, 1638. York, Clayton 65. Quære, For if Judgments be kept on foot by Fraud, and given in Evidence, how can a Creditor who sues for a just Debt, be prepared to detect this Fraud: And Note, In Scire facias against an Executor on Judgment per Testator, the Defendant pleaded fully administred generally, and the Plaintiff demurred specially, and Sir William Jones Sollicitor General moved to amend the Plea; and Hale Chief Justice thought he ought to plead specially, how fully administred, Bradford vers. Hutchinson, H. 25, 26 Car. 2. B. R.

Debt for Rent on a Lease; the Evidence to prove the Lease was, that the Plaintiff leased a House to the Defendant at a Rent, but no time mentioned, and it was agreed at the same time, that the Lessee was not to leave it without half a years warning, per Hale, Norf. Summer Assize, 1668. It's a Lease at will, and the leaving on half a years warning, is but a Collateral Agreement, and no part of the Demise.

Ejectment.

The Plaintiff Counts of a joint Lease made by A. and B. in Evidence it appeared that A. B. and C. were Joint-tenants, that C. leased to B. and that A. and B. leased to the Plaintiff, by three Justices against two it's good, 2 Cro. Jurdanes Case, f. 83.

Ne

Ne dona pas may be maintained by a Devile; and upon a Feoffment, a Lease and Release; but a Fine and Release will not maintain a Demile to Husband and Wife.

When he that sued an Elegit brings an Ejectment to try the Title, he must in Evidence shew the Elegit filed. Elegit.

Count of a joint Lease made by two, in Evidence it appears they were Tenants in Common, by 3 Just. against one, it's not good, 2 Cro. 166. Mantles Case.

Count of a Lease by Husband, Evidence was a Lease by Husband and Wife with Letter of Attorny to make Livery, and 'tis made in Name of both, by 3 Just. against one it's good, for Livery as to the Feme was void, 2 Cro. Gardners Case.

Of a Lease made 5 May 10. Regis habendum from Lady-day last past for 21 years, Ex tunc prox. sequent. In Evidence, a Lease of 5 May 10. Regis habendum from Lady-day last past for 21 years next following the date of the said Indenture, adjudged good and affirmed in Error, Hob. 19.

Ejectment of a Rectory, Evidence of the taking of Tithes only, and not Entry into the Glebe, the Plaintiff was non-suit, Latch. 62. Hems and Stroud.

The Rule to confess Lease, Entry, and Ouster doth not extend to confess actual Entry upon a Lease, that is, the Title; But the Court said an Entry shall be intended until the Contract be proved of the other side, Siderfin 223

But

But he that makes a Leafe, or an Affignment of the Leafe after the Commencement, muft be in poffeffion, &c.

In Ejectment by Leffee of Leffee of the whole by many Co-heirs, which was made by reafon of the incertainty of the part claimed by the Leffors, and per Cur. Leafe of all Parts warrants Leafes of all, Keeble 2 part, 700.

If a Truftee of a Leafe be Leffor in Ejectment, his difclaimer in pais will avoid the Plaintiffs Title, 794.

In Ejectment, The Leafe of a Guardian or Copy-holder will maintain the Declaration, though void againft the Lord and Infant; but a Leafe de Harbage, will not of Meadow, Hardres Rep. 330.

Ejectment of a Leafe to A. of Lands in the poffeffion of three Tenants for years, delivered to J. S. as an Efcrow with Letter of Attorny to enter into all, and then to deliver his deed, &c. Evidence, that the Attorny entred upon one Leffee in name of all, and delivered the deed, &c. Per Jones Juft. it's good enough, for where the Freehold is in one, his Entry into one Leffee for years in name of all the reft is good, Latch. 71. Dame Argols Cafe.

Where one declares on a fictitious Leafe to A. for three years, and within the fame time declares of another fictitious Leafe to B. of the fame Lands, the laft is not good. For Treſpaſs for the mean Profits muft be brought in the firſt Leffees Name. ut dicitur.

In

In Ejectment the Defendant shall not give in Evidence a former Mortgage or Conveyance made by himself, and therefore in such Cases 'tis left for him that has the former Mortgage to get himself made Defendant before the Cause comes to Tryal.

Ejectment of Tithes; a Lease for Life of Tithes is good, if there be Church or Church-yard to make Livery in, resolved in Trial at Bar, Wheeler versus Hancher, Hill. 14, 15 Car. 2. B.R. v. Jones Rep. 321, 322.

Entry and Claim made upon the Land within five years after the death of the Baron of the Countess of Peterborough to avoid a Fine, she being Issue in Tail, proved by one Witness, and allowed at a Trial at Bar, B. R. Mich. 15 Car. 2. Floyd and Pollard.

Custom of Copy-holders in extream is to surrender into one Tenants Hands, in the presence of credible Witnesses. A Surrender was made accordingly, but presented to be done to another Tenant, yet being proved to be done to a Tenant, it was holden by Wadham Windham Just. to be good: And by him, a Glove or a Turf is a Rod to give Seisin by, Mayes Case, Norf. Summer Assises 1663.

A Will under which Title to Land is made, must be shewn it self, and the Probate is not sufficient. Contr. if it were on a Circumstance, or as inducement, or that the Will remain in Chancery, or other Court by special Order of such Court, Eden

verſ. Chalkhill, Mich. 13 Car. 2. B. R. Keeble 1 part, 117.

Alſo Inrolment of a Deed, which needs no Inrolment, is no Evidence, ib.

How a Perſon in Ejectment of a Rectory ſhall make out his Title.

He muſt prove Admiſſion, Inſtitution and Induction, his reading and ſubſcribing the Articles, &c. and his Declaration in the Church of his free and full aſſent and conſent to all thoſe things contained in the Common Prayer, and this ought to be proved done within the time limited by the Statute, but need not ſhew a Right in him that preſented him,

See Keeble 2 part, 484. In Evidence an Inſtitution without Preſentation, or Copy of it, was refuſed by the Court, albeit a Preſentation may be made by Parol, but proof muſt be made of it; if there be Induction upon it, I think it good Evidence.

The Iſſue was Fine uncertain, or certain two years Rent and no more, the Evidence was of admittances on Surrenders uncertain, but all under two years Rent. Per Williams Juſtice, You ought to produce Fines on Deſcent, and Fines paid above two years Rent, 2 Bulſt. 32. Allen verſus Abraham.

A Leaſe was made by parol and agreed to be put in Writing, and Indentures beſpoke, but being held for ten years, and no Indentures executed, it was ruled for a Leaſe parol, Per Berkley Juſt. 13 Car. 1. York, Clayton 53.

By Juſt. Berkley (1638. York, Hedges cont. Clayton 57.) A Will under Seal, proved, examined by the Original, was allowed good Evi-

Evidence. Quære, I think the Practice against it.

A Lease and Release were given in Evidence to entitle the Plaintiff, and they both were named hæc Indentura, but were not indented: Good, Per Hales Chief Baron, Norf. Summer Assises 1668. Briant versus Trendle.

After default (in Ejectment) the Defendant may confess Lease, Entry and Ouster, and may give Evidence, and have all advantages (except Challenges) and if the Plaintiff becomes non-suit, any one for the Defendant may pray it be recorded.

Per H. Wyndham Just. Bucks Lent 68. Dr. Crawlys Case. Deprivation in Spiritual Court for Simony disables from bringing Ejectment, because he can make no Lease; yet quære.

If Mortgagor continues in possession without provision for that purpose in the Deed, he is Tenant at Will, and if he levies, a Fine it's no Disseisin by him continued in possession still, because after the Will determined he is Tenant at sufferance, Per Hale Chief Baron, Bedford Summer Ass. 1669.

Declaration on a Lease made 14 Jan. 30. Eliz. Evidence of a Lease sealed 13 Jan. good, for if it was a Lease 13. it was a Lease made 14. 4 Leon. 14.

If the Declaration in Ejectment be of Michaelmas-Term which relates to the first day of the Term, yet 'tis Matter of Evidence, and examinable what day the Bill

was filed, and if 'twas after the day of the Leaſe, all is well, Siderfin 432.

Feoffments of 40 years ſtanding, and poſſeſſion going accordingly, you need not prove Livery, it may be intended per Jury, Rolls Rep. 132.

The Common Rock on which ſo many have ſplit, is laying the Leaſe to be a die datus, and the Entry the ſame day, which is a Diſſeiſin, not purged by the Commencement of the Leaſe, for where an Intereſt paſſes (ā) is excluſive, and ſo the Entry the ſame day, is before the Leaſe was to Commence, and is a Diſſeiſin, but in caſes of Obligation where no intereſt paſſes, it is contra, quod nota.

Treſpaſs.

Count of Treſpaſs done in one Acre, Evidence of Treſpaſs done but in half that Acre, good, 2 Cro. Winkworths Caſe.

The Lady Hatton brought Treſpaſs for breaking her Cloſe, and taking away her Horſe, &c. againſt the Defendants, they plead Not Guilty, as to the taking of (Her) Horſe, as to the reſt, they ſay that the Horſe of one of the Defendants was in the Cloſe, &c. and they took him out doing as little damage as they could, quæ eſt eadem &c. The Plaintiff replies de injuria ſua propria, &c.

The Evidence was, That the Plaintiff as Lady of the Manor took the Horſe as an Eſtray, and it was cryed and marked, &c. that the Defendants refuſed to pay for the Meat

Peat, and took him away, before the year and a day was out.

1. Per Wadh. Wyndham Just, d'Assize, A Lord may detain an Estray for Peat, yet no Trespass lies if the Owner takes him, but an Action of the Case lies for the Peat.

2. If the Action had been brought against the Servant only, he must justifie, &c. But being brought against Master and Servant, this joint-justification is good.

Cambr. Summer Assises 1667. Lady Hatton against Cotes and al.

In Trespass, the Evidence for the Defendant was, That the Defendant had a Barn, and purchased a Way over the Plaintiffs Land to that Barn, after the Defendant bought other Lands lying contiguous to that Barn on the one side, and to a Haven on the other side, and carried Carriages by that way to the Barn, and through it over his own new purchased Land to the Haven. Per Hale Chief Baron, If I purchase a general Way to such a place, I may go from thence on my own Ground whither I please, though I purchase the Ground after the Way purchased, Summer Assises Norf. 1665. Heynsworth vers. Bird.

Trespass was brought against many, by a School-mistress, for taking away a Child (her Scholar) with a Scarf of the Mistresses; per Keeling Ch. Just. In Trespass for taking (things) all are Principals that are present and consenting, Contr. in taking (Persons) And this Action lies not by the Mistress for the Child, but for the Scarf

only, Lent Norf. Aff. 1663. Mary Coopers Case.

Treſpaſs lies for Leſſee in Ejectment on a fictitious Leaſe to recover mean Profits during the continuance of that Leaſe mentioned on Record: And the Recovery ſhall maintain it. Otherwiſe if brought by the Leſſor, for he is no Party to the Action.

But ſee Siderfin 239. If a Recovery be in Ejectment, and afterwards Treſpaſs is brought, for the mean Profits before the Leaſe, nothing ſhall be given in Evidence but the value of the Profits, and not the Title, for otherwiſe Trials would be infinite.

Alſo if it be between the Parties the Record is an Eſtoppel; and ſo the Court held it ſhould be if it was againſt under Tenants.

But quære if the Defendant be one that has a Title, if he cannot give this in Evidence, for otherwiſe it would be a great miſchief.

Treſpaſs lies not for pulling down a Pew in a Church faſtned to a Pillar with a Chain. Contra, had it been fixed by Nails driven into the Pillar, Per Glyn Ch. Juſt. Trevors Caſe.

Treſpaſs quare fregit liberam Warrenam ſuam, and took his Conies. In Evidence it appeared that the Plaintiff had liberty of Chaſe in the place, which though it includes Warren; yet a general Treſpaſs lies not, but an Action of the Caſe, &c. of Arundels Caſe, Paſch. 1658. B. R.

Per

Per Earl Sergeant, If Beasts be impounded, and the Key lost, the Officer by Replevin may break the Pound, and deliver the Cattle, per Stat. Marlebridge, 52 H. 3. 21.

Tenants in Common must join in Trespass done against them, so Avowry, Lead and Lamsteads Case, 7 Car. B. R. cited by Finch in Argument. Or Tenant in Common surviving shall have Trespass.

In Trespass, The Defendant sets forth conditional Feoffment for payment of Mony at such a day and place, and that he paid it accordingly; Issue joyned on the payment at the day and place, Evidence of payment before the day is not good. Contra, had the Special Matter been pleaded with acceptance, More 47.

In Trespass with Continuando to recover mean Profits, an Entry and Possession of the Land before the Trespass must be proved, and also another Entry after the Trespass.

In Trespass, the Defendant prescribes to dig in the Common for Clay, to repair ancient Houses holden of that Manor, and good, Berney vers. Stafford, Norf. Lent Assises 1667.

In Trespass they were at Issue on Not Guilty, and at the Assises the Defendant left his former Plea, and pleaded an Accord with satisfaction, the Judge would have had it replied to and tried presently, but the Councel refused, whereupon the Jury was sworn, and the Plaintiff nonsuited, Bedford Assises Lent 1667. Green versus

Reynolds. But this was contrary to the Opinion of Sir Orlando Bridgman, at the same Assises, and contrary to 10 H. 7. 21. and 1 Bul. 92.

Trespass lies by Recovery in Erroneous Judgment for a mean Trespass, because the Plaintiff in Writ of Error recovers all mean Profits, and the Law by fiction of relation will not make a Wrong-doer dispunishable, 13 Rep. Co. 22. but Contra, where Act of Parliament restores, &c.

Trespass for Assault and wounding in Suff. the Defendant as to vi & armis non Cul. As to the other justification of molliter Manus, &c. in Norf. and several Tryals, Per Hales Ch. Baron, Suff. Ass. Summer 1668. the vi & armis can't be tried till the other be tried. Contr. If the first Issue of non Cul. was as to the wounding; and by him Evidence of Livery of Seisin, generally, shall be intended for life only.

Son assault demesne.

The Defendant proved the Plaintiff threatned the Defendant by saying, Were it not Assise time, he would tell more of his mind, which he said, bending his Fist, and with his Hand on his Sword, yet per Cur. This is no Assault, as it would be without that Declaration: But it was farther sworn the Plaintiff with his Elbow puncht the Defendant, which if done in earnest Discourse, and not with intent of Violence is no Assault, nor then is it a Justification of Battery after a Retreat, Keble 2 part, 545.

The

The Hogs of B. were put into the yard of A. and broke into the Land of C. and did Treſpaſs, Action lies againſt A. though the Servant of B. did look to them and ſerve them, by which the Owner had the ſpecial Poſſeſſion of them. So if agiſted Cattle do Treſpaſs, the Agiſtor ſhall anſwer, Dawtry verſ. Huggins, Clayton 33. per Barkley, 11 Car. York.

A. by Indenture of Uſes raiſed an Eſtate to B. in Fee, who regrants Turbary to A. by another Deed, and after A. levies a Fine to confirm the Eſtate and Uſes above-ſaid declared; this doth not touch the Turbary, per Vernon, 11 Car. York, Clayton 42.

Any one imployed by an Officer, is an Officer within 7 Jac. 5. to plead general Iſſue, and give the ſpecial matter in Evidence, Clayton 54.

Preſcription to Tether Equos & Boves upon ſuch a Walk, &c. Mares and Cowes, good Evidence within that Preſcription, Per Barkley, Clayton 54.

Per Hale, A Corporation may Bargain and Sell, though it has been thought an Uſe upon Uſe, they being ſeiſed to the uſe of their Houſe: But I think it rather a Truſt than an Uſe.

If a Juſtice of Peace ſend his Warrant to J. S. (who is no Officer) to bring one before him, if J. S. be no Officer, he is not bound to execute it, yet if he does execute it, it's good, and he may execute it in any part of the County. And ſo a Conſtable of one Town may execute a War-

Warrant in any other Town in the same County, and any such Warrant is as large as the Justices Commission is, per Hale Norf. Summer Assises 1668. Wrongrics Case.

In Trespass against one for Gleaning on his Ground, per Hale Norf. Sum. Assises 1668. The Law gives Licence to the Poor to glean, &c. by the general Custom of England, but the Licence must be pleaded specially, and can't be given in Evidence on non Cul.

In Trespass quare Clausum & Domum fregit Et alia enormia ei intulit, after Verdict for the Plaintiff and 60 l. Damages, 'twas moved for a new Tryal by reason of excessive Damages, and upon Affidavit that the Jury intended great part of the Damages for the Injury the Defendant did to the Plaintiffs Daughter, &c. which came in under the & alia enormia, the Plaintiff had Judgment; and a difference was taken, that Damages ex turpi causa may be given in Evidence under this General Clause, Et alia enormia, but from nothing else, Siderfin 225. Sippora versus Basset.

Trover.

The Citizens of London gave in Evidence their Custom to take Toll, Jones 240.

In Trover, for an Horse proved of 15 l. value, the Jury gave but 3 l. Damages, upon mistake, they thinking that the Plaintiff had his Horse again.

Per

Per Wadh. Wyndham; If the Jury had not been gone, they should have mended their Verdict; but a new Action of Trover lies for Damages for the Horse, in which the Jury shall prove the 3 l. given was only for the Conversion, not the value of the Horse; and by him, Trover lies for Goods in the Plaintiffs possession, to recover Damages for the Conversion only, Tyndal vers. Jolliffe Norf. Lent Assises 1660.

In Trover by Administrator where the Conversion was in the time of the Intestate the Plaintiff must shew the Letters of Administration. Contr. where the Conversion was after his death, Per Hale Norf. Sum. Ass. 1660.

If an Estray be claimed within the year and the day, &c. and the Lord refuses to deliver it; Trover lies, though the keeping is not paid for, and the Lord says he detains for the same; and the Lord can't detain for the Neat, &c. but must bring his Action, Per Moreton Justice Lent Norf. 1667. Bond vers. Paston, Quære: vide Dent Tit. Trespass per Wyndam contr. and I think is Law, Vide Rolls Tit. Estray 889.

At the same Assises Daniel versus Berney, by Moreton Justice, Proclamation may be made of an Estray by any Person, and it is not necessary that it should be made by the Bell-man or any other Officer, Vide Co. Entries 170. Barber vers. Fawcet. In Trover, Issue was joyned on tender of amends for keeping, &c. and Verdict pro Plaintiff and Judgment.

Note,

Note, I find Precedents, that in Trover, the matter of an Estray may be pleaded specially, or given in Evidence on Not Guilty.

Oats were taken from the Owner, and carried to a Miller to make into Oatmeal, and before it was done, the Owner prohibits the Miller, &c. and demanded the Oats, who, notwithstanding, made them into Oat-meal, Per Barkley it's a Conversion in the Miller, 1638. Clayton 57. Holsworths Case.

On non Cul. The Defendant gave in Evidence, a Seizure for Goods Foreign bought and Foreign sold. Per Custom of Lynn Norf. good, per Hale Norf. Sum. Aff. 1668. Harwich verf. Twells.

A Man lends his Horse to a Special Purpose, the Bailee abuses the Horse, and over works him, then the Lender takes the Horse again. Per Hugh Wyndham Justice Lent Assises Bucks. Trover lies not, Constables Case.

Dower.

In Dower, the Issue was ne unque seisie que Dower, and for the Plaintiff, a Feoffment in Fee was given in Evidence to the Husband, the Defendant would have given in Evidence, a Seisin in Tail with a Discontinuance, and then the Feoffment, &c. and so a Remitter, but it ought to be pleaded per Cur. Dyer 41. Nor an Estate upon Condition.

If

If an Heir Mortgage for years, and then assign Dower legally, i. e. a third part of the whole, the Assignment shall bind the Mortgagee; Contr' if the Assignment be illegal, as of one whole Manor when there were three Manors; that being not as the Law would have done it. And if a Disseisor assign a legal Dower, it's good: But if the Heir Mortgage in Fee, and then assign, &c. legally, &c. that is not good, because the whole Free-hold was out of him at the time of Assignment, per Hugh Wyndham Justice, Bucks Lent Ass. 1668.

Account.

Against S. as Receiver of two 30 l. and as Bailiff for receiving his Rents for several years, not saying any certain Sum of Rents: Per Earl Sergeant, The proper way is to find quod Computet, as to what is certain in the Declaration and so proved, as the Mony was, but not to the Rents, and so he said was the Opinion of Hale. But per Moreton Justice, the Verdict shall be general, and it may be both ways, Sayes Case, Norf. Lent Assises 1667.

Thus far I have made an Essay of a Method to be farther built upon by our Practiser, and have given some Cases, not in Print, and (it may be) useful. I shall add some other Cases, not so proper for Heads, except that of (Evidence) with which I shall conclude this Chapter.

Evidence.

Evidence.

Inſpection of a Deed inrolled may be given in Evidence, Contr. of a bare Deed not inrolled, or of a Deed that needs no Inrolment, Paſch. 1655. B. R. Goodſons Caſe.

An Inſpeximus lieth only of Matter of Record, and not of a private deed, Keeble 2 part, 294.

A deed to lead the Uſes of a Fine was inrolled on the acknowledgment of but one of the Parties to it, and was allowed by Glyn Chief Juſtice in Evidence, as Roll Chief Juſtice had done before him, though no binding Evidence, Turber verſ. Maddiſon Paſch. 1655. B. R.

An Office found at a Death, &c. may be given in Evidence.

A Verdict againſt one, under whom either Plaintiff or Defendant claims, may be given in Evidence againſt the Party ſo claiming. Contr. if neither claim under it, Duke and Ventres, Mich. 1656. B. R.

If an Action be brought on a Statute, which has ſeveral Proviſoes in it, the Defendant may plead Not Guilty, and aid himſelf by any of the Proviſoes in Evidence; But if proviſoes be made to that Statute, of which the Defendant may take advantage, he ought to plead it, and not give it in Evidence, Per Roll Chief Juſtice, Mich 1650. B. R. Jones 320. accord.

Joint

Jointenancy in Trespas cannot be given in Evidence; but must be pleaded in Abatement, Jones verſ. Randal, Hill. 1652. C. B.

Arreſt and Impriſonment to prove a Bankrupt must be proved by Record, Newby verſ. Bathurſt, Paſch. 1659. B. R. In a Trial at War, what Evidence proves a Bankrupt, Keble 2 part, 487. Bankrupt.

The Cuſtom of New-England to marry by the Magiſtrate in the preſence of a Miniſter, was allowed good by Hale Chief Juſtice B. R. Trin. 1663. at Guild-hall int. Hall & Hall.

The Certificate of the King under his Sign Manual was allowed in Chancery for proof without Exception, Hob. 213.

Records, as Patents, Statutes, Judgments, may be given in Evidence, Hob. 227. contr. to Dyer 129.

To prove an Extent upon a Statute or Judgment, you muſt prove a Copy of the Statute and Judgment, as well as the Copy of the Writ and Extent.

When Records are pleaded, they muſt be Sub pede Sigilli, contr. if given in Evidence, Stiles 22. White's Caſe.

An Anſwer in Chancery, is Evidence againſt the Defendant himſelf; but the Bill muſt be proved, Godb. 326.

If the Party make Oath that he cannot find his Witneſs, then he is as it were Dead, and his Depoſitions in an Engliſh Court may be given in Evidence betwixt the ſame Parties, Godb. 327. Not only the Plaintiff, but any Stranger may give the Defendants Anſwer in Evidence againſt the

the Defendant, but not againſt others, Siderfin 221. A Bill in Chancery given in Evidence againſt the Plaintiff himſelf, where there are Proceedings upon it, Keble 2 part, 499.

Upon a Traverſe of a Leaſe parol for years, viz. Abſq; hoc quod A. demiſit, &c. Nihil habuit in tenementis, may be given in Evidence, Dyer 122.

Shewing a Grant to dig Turfs, is no Evidence againſt a Preſcription for the ſame, but the Grant being the ſame with the Preſcription, ſhall be taken as a Confirmation, Crew & Vernon, Moor 819. Quære tamen, vid. Moor 830. Where a Court of Pipowder is claimed by Preſcription and Grant, and good, 2 Cro. 313. Acc.

In Treſpaſs for taking Goods after Judgment, per confeſſion, non ſum informatus, or nil dicit; Property need not be proved to a Writ of Inquiry, for it would oppoſe the firſt Judgment, Quod querens recuperet, and the Judges might have aſſeſſed Damages if they would, Yelv. 151. Yet quære, If the Defendant may not diſprove Property in mitigation of Damages; for the Jury may find no Damages.

A Copy of a Deed, is good Evidence where the Defendant has the Deed, and will not produce it, Per Vernon Juſtice, Clayton 15.

So that there was a Revocation, is ſufficient for the Heir, without ſhewing the Deed it ſelf, which was taken away by the Defendant, ſo that the Witneſſes to the Re-

Release proved the Lease without shewing, being taken away by the other side.

A Deed of Feoffment without Livery may be given in Evidence as a Release, Per Berkley, 11 Car. Clayton 32.

If a Fine be given in Evidence, with five years non-claim, &c. the Fine must be shewed with the Proclamations under Seal, and the Cirograph will not serve.

The Confession of a party must be taken whole, and not by parts; As if to prove a Debt, it be shown that the Defendant confessed it, but withal he said at the same time, that he paid it, his Confession shall be valid as to the payment as well as that he owed it, Per Hale Chief Justice. And so is Common Practice.

A Deed cancelled by Practice, was allowed to be read in Evidence in Action under that Deed, the Practice being proved, Hetley 138.

Against a Purchaser bona fide, recital in a Deed of Mony paid is not sufficient, nor Acquittance for the Mony, unless it be of ancient standing, and then it shall be presumed.

The Deed to lead the Uses of a Fine sur concessit, need not be proved per Testes.

If a Deed of Feoffment be shewn, but no Livery, Possession going with the Deed, is Evidence to a Jury to find Livery.

At Guild-hall, Trin. 23 Car. 2. Hale Chief Justice cited the Case of Sir Paul Pinder, A Levari, &c. was proved by a recital of it in another Record, and Hale and Mainard demurred on the Evidence, and adjudged against them,

them, for this Cause, viz. That it was proved there was such a Record, that it was filed, that it was taken off the File. But (by him) generally without such proof, the Evidence is not good, because one Record may recite one that never was.

The Jury are to decide the Fact, and Evidence is not given but to inform them in their Consciences of the truth, for although no Evidence is given of either side, yet they may give their Verdict of one side or the other. 14 H. 7. 29. And therefore although two Witnesses are necessary, where the Tryal is by Witnesses, as in the Civil Law; yet they are not of necessity where the Tryal is by Jury. And where Witnesses are joyned with the Jury, yet they may be rejected, if they will not agree with the twelve, and the twelve may give their Verdict.

Office of the Jury.

The Jury after they are departed from the Bar, may return to hear their Evidence of any thing they doubt before the Verdict.

Sur Travers de done in tayle, the Witnesses prove, That another made the Done; this doth not warrant the Issue.

Done in tayle.

In an Action against the Sheriff upon the Statute of Extortion, that he took it for Barr-fee of one who was acquit, is good Evidence.

Extortion vers. vic. Fee.

Possession is an Evidence of right, and he that hath possession may distrain the Cattel of him that hath no Title, for the taking is in respect of the possession, more than of the title.

Possession.

In

In Debt for Rent upon a Lease, and nil debet pleaded, ne unques seisie de terre is good Evidence, otherwise upon the Plea of riens arrere, or levy per distress. Debt for Rent

A Receipt of the last half years is Evidence that all before was paid.

Eviction or expulsion may be given in Evidence upon nil debet in an Action of Debt for Rent.

Parson or not Parson, in such Issue you may give in Evidence a resignation, although it be in another County and Spiritual. Parson.

In riens passe per le fait, Not his Deed may be given in Evidence. Fait.

In Trespas, quare clausum fregit, with Abuttals, all the Abuttals and descriptions must be proved. But if the Abuttal be laid North, &c and it incline North, though not directly, it is sufficient: & sic de cæteris. What ought to be proved in Evidence. Abuttals.

Upon this Issue, the account given to the Ordinary, shall not be given in Evidence, nor any respect had to it. *Plene Administravit.*

That the Executor paid a Legacy, is Evidence that he had Assets.

Will. The Probate is good for the personal Estate, but not to prove a Will in Writing of Land by the Statute. What shall be given in Evidence, and what is good Evidence.

Recital of other Grants by Letters Patents, in Letters Patents, are some Evidence, but not fit to be allowed, without shewing the former Letters Patents or a Copy. But the Jury may find them. Recital in Letters Patents.

The proof of this surmise in any Court of Record, shall not be given in Evidence Surrender. Prohibition.

in another Action, upon the same custom, because the Defendant in the Prohibition cannot cross examine.

Depositions. Depositions in the Court Christian, in the Court of the Council of York, touching the title of Land, of which they have not conusance, or in another Suit against him, who claimeth not under those parties, by the Commissioners upon a Commission of Bankrupt, because the party could cross Examine, shall not be allowed in Evidence. But see Keeble 2 part, 348.

Littletons Rep. 167.

Sentence. But a sentence given in the Spiritual Court touching Tythes, may be given in Evidence in an Action at Common-Law, for this is a judicial Act.

Custom. To lay a Custom to a House and Land, to prove it to Land only, not good. Godbolt 234.

Recusant. The Record of Conviction of Recusance being burnt, may be proved by the Roll of Estreats of the Clerk of Assise, signed by the Judge and delivered into the Pipe, or by other Evidence, as a Fieri facias, &c. may be proved by other Evidence.

Fraud. A Voluntary Conveyance is not fraudulent, because voluntary; but it is a great Evidence of Fraud against a Conveyance made bona fide, and therefore this Fraud must be found by the Jury. Keeble 1 Vol. 486.

Church. 'Tis good Evidence to Convict one upon the Statute Eliz. for not coming to Church, to prove that the party was not at his Parish, Church, such a Sunday, and the party may shew that he was at Church elsewhere.

After

After Evidence given, and the Jury ready to give their Verdict; and then the Attorny General will not proceed, but draws a Juror, and brings another Information, none of the former Jurors shall be admitted to give in Evidence, that the Jury were ready to give their Verdict against the King in the first Information, for this ought not to be discovered, for so no benefit would accrue to the King by his Prerogative to draw a Juror. Former Tryal.

But this may be given in Evidence in another Action, where the King is not concerned. What may be given in Evidence upon a special Issue.

In Debt for Rent upon non dimisit, that the Lessor riens avoit in the Land at the time of the Demise, may be given in Evidence. Debt for Rent.

So upon Nil debet an eviction may be given in Evidence. If the Lessor enter into part, the whole Rent is suspended; but if a stranger evict the Lessee of part of the Land, the Rent must be apportioned.

Upon an Issue of Common appendant, &c. common pur cause de vicinage, cannot be given in Evidence. Common.

If the Defendant plead son assault demesne, in Battery, and the Plaintiff reply, de injuria sua propria absque tali causa, and so Issue is joyned, if there was a battery at another day, then what the Plaintiff and Defendant have assigned upon the Plaintiff, and another upon the Defendant by the Plaintiff, the Verdict ought to be for the Defendant; for if the Defendant prove any Assault made upon him by the Plaintiff, this ought to be found for him, although it was at another day than Son Assault Demesne in Battery.

what he hath alledged, for the day is not material: but upon such special justification the Defendant hath liberty to prove his Plea at any time, and the Plaintiff might have made a new assignment at another time, for peradventure there might be several Trespasses at several times, to which the Defendant may have several Pleas, and therefore if such manner of pleading should not be allowed, and such Evidence, the Defendant could not tell how to help himself, nor could know for what Trespass the Action is brought. Vide devant hic & apres cap. 13.

Surrender. If the Issue be whether the Kings Tenant by Letters surrendred to the King or not, the accepting of new Letters Patents, which is a surrender in Law, is good Evidence.

Non assumpsit. If a special promise to pay 20 l. if the Plaintiff would pay 10 l. &c. Upon an averment that he paid the 10 l. Upon non assumpsit, the Defendant shall not give in Evidence that the Plaintiff did not pay the 10 l. neither is the Plaintiff bound to prove it, for the Issue is upon the assumpsit, and not upon the payment of the 10 l. which might have been traversed. And although 'twas said, That in all Actions there is a general Issue to be taken, which shall put all the Declaration in Issue, and that must in this be non assumsipt, or nothing, yet by the advice of all the Justices of Serjeants Inn in Fleetstreet, it was ruled as abovesaid, Mich. 16 Car. B. R. between Holditch and Brodrig. I have been the more particular in this, because I have known Plaintiffs non-

non-ſuited in ſuch Caſes as the Allies for want of proving the averment: although I muſt confeſs I never agreed with the Judge herein that did it. For it is a miſtake to ſay, The Plaintiff muſt in all caſes prove his whole Declaration; if he proves the matter in Iſſue, he ought not to be non-ſuited. Rolls tit. Tryal, 1681.

If an Avowſon be pleaded to be granted Per fait, and this Iſſue is taken by a ſtranger to the fait, if it be found granted ſans fait, or by another fait it is good, for the Deed is ſurplus, and the effect of the Iſſue is upon the grant, not upon the fait. *Grant per fait.* Where it is ſufficient to prove the effect of the Iſſue.

If an Impriſonment by Dures at D. be in Iſſue, 'tis not material whether he was ever at D. or not, for the effect of the Iſſue is, if the deed was made by dures. Dures.

So if a Feoffment pleaded by Deed, a Feoffment without deed, or another deed is good, for the effect of the Iſſue is upon the Feoffment, not upon the fait. Feoffment.

In Eſcape of a Priſoner, and the Iſſue is, if the Gaoler immediately after the eſcape made freſh ſuit, if the Priſoner hath eſcaped a day and night before the Gaoler knew it, and then he makes freſh ſuit, it is ſufficient to prove the effect of the Iſſue, for convenient purſuit is immediate freſh ſuit in Law. Freſh Suit. Eſcape. The Writ, the Warrant, Arreſt and Eſcape are to be proved in an Eſcape.

In Eſcape againſt the Marſhal the Plaintiff muſt prove the perſon that eſcaped in actual cuſtody ſince the Committitur, which Committitur either in the Marſhals Book, or on Record is not ſufficient, without a proof of being in actual cuſtody ſince. Keeble

1 Vol. 375, 775. See Keebles 2 part, 384. What may be given in Evidence upon an Information of negligent Escape, against the Marshal of the Kings Bench, as a Recovery in the Original Action, and the Plaintiff allowed a Witness, because he neither gains nor loses.

Non demisit modo & forma. If in pleading an Indenture of Demise you mistake the recital, and the Issue is non demisit modo & forma; The mistake shall not hurt, for the effect of the Issue is upon the demise.

If the date or number of years be mistaken, 'tis fatal.

What things may be given in Evidence upon the general Issue. Tresp. Battery.

If a Man plead Not Guilty, he cannot give in Evidence a matter justifiable, which shall be a confession of the Act, for this is contrary to the Issue. As son assault demesn in Battery upon Not Guilty: but upon Not Guilty in Tresp. for beating ones Servant, per quod servitium amisit, you may give in Evidence, that the Plaintiff did not lose his Service by the Battery.

Waste.

Nor upon nul waste fait, can he say, sufficient ment repair devant le brief purchase.

Servant.

If my Servant without my consent put my Cattel in the Land of another, I may plead Not Guilty, and give this matter in Evidence; for by putting the Cattel in, the Servant has gained a property.

Information.

Upon Not Guilty, he may give in Evidence a discharge by a Proviso in the same Statute, for thereby he is Not Guilty, Contra formam Statuti, but not a Discharge by another Statute.

Upon

Upon non habuit ſeu tenuit ad firmam contra formam Statuti, the Parſon may ſay, he took the Farm for maintainance of his Houſe, according to the Proviſo in Debt upon the Stat. 21 H. 8.

But upon the Statute 5 E. 6. for ingroſſing, upon Not Guilty, 'tis ſaid, That the Defendant cannot give in Evidence a Licence according to the Proviſo of the Statute. ſed quære rationem.

Upon ne unque ſon Receiver, &c. the Defendant cannot ſay that he paid the Mony according to directions, &c. Account.

In a Scire facias againſt Tertenants and a Feoffment pleaded before the Judgment abſque hoc, that he was ſeiſed Tempore Judicij, and Iſſue upon the ſeiſin, that the Feoffment was fraudulent, to defraud the Judgment, may be given in Evidence; but otherwiſe, if the Iſſue had been upon the Feoffment. Seiſin. Feoffment.

So upon riens per diſcent, by an Heir in Debt upon an Obligation, That the Defendant alienes the Aſſets by fraud and covin, and ſo void by the Statute of 13 El. may be given in Evidence, becauſe theſe are the generall Iſſues. Riens per diſcent.

In Treſpaſs for taking a ſtack of Corn, the Evidence may be of part, and the Verdict as to four Combs or Buſhels, Guilty, and as to the reſt, Not Guilty. Parcel.

In an Information for Writing, Printing and Publiſhing a Libel, That Copies were found in the Defendants Chamber, is no publication, without diſcourſing it or delivery of it out. Keeble 2 part, 502. Libel.

If

If in the Evidence it appear that the Bill was filed afterwards, nothing that the Defendant had in his hands, and paid before the filing of the Bill shall be Assets, for otherwise there might be great inconvenience.

Plene administravit.

Upon this Plea the Executor may give in Evidence a retainer for a Debt due to himself of as high a nature; or payment of Debts with his own Mony, and that he kept Goods of the Testator in lieu; for this alters the property.

The Original need not be shewed in Evidence upon this Plea, nor upon the Issue Assets at the day, &c. because the day is agreed in pleading. Yet see Siderfin 432.

What Evidence the Jury may have with them.

They can have nothing but what is delivered to them in open Court, and given in Evidence by the Party in Court, if an Exemplification come out of Chancery of Witnesses examined there upon Oath, who are dead, the Jury shall have this with them; but if the Exemplification comprehend some Witnesses alive and some dead, they shall not have it with them.

Exemplifications.

Neither shall they have any Pedigree drawn by a Herald at Arms, for it is no Evidence, only information for direction. What Evidence the Jury may have with them, see the 14th Chapter.

Pedigree.

Not an Office before an Escheator, unless exemplified, nor a Testimonial, nor a part of a Fine indented unless exemplified, but they may find the same specially.

If a Man makes a Feoffment and afterwards makes another, with Covenants that he was seised, &c. and afterwards an Issue is taken upon the first Feoffment, the Feoffee shall not be a Witness. Who may be Witnesses. Not persons interested either in Law or Equity, in *præsenti* or *futuro*.

In an information for Usury, the party shall not be a Witness, because he would thereby avoid his own Bonds, &c. and he testis in propria causa. Usury.

In case of Forgery, Perjury and Usury, the party grieved may have advantage by the Verdict, and therefore shall not be received as a Witness; but in Case of an Indictment for Battery, he that was beaten may be Witness, because he can reap no benefit by the Verdict in another Suit. Hardres Rep. 331.

Three Men swear an Arbitrement in three several Actions against them, upon the Statute 5 Eliz. of Perjury, each of them may be a Witness for the other; but in an Indictment of Perjury upon 5 Eliz. the party grieved shall not be a Witness, for he is to have 20 l. Perjury.

Conventicle of thirty or forty is evidence of Terror, &c. Keeble 2 part, 558. Terror.

Common experience tells us upon an Indictment for Battery, &c. the party grieved may be a Witness, because 'tis only for the King.

In an Action against the Hundred upon the Statute of Winton, &c. the Lessor living out of the Hundred may be a Witness, for 'tis not reason that he and his Lessee being an Inhabitant should be both charged: If the Servant be Robbed of the Masters Money, the Hundred.

the Matter may be a Witness to prove the delivery of the Mony to the Servant before the Robbery. Rolls Tit. Tryal, 686.

Proceedings in Ecclesiastical Court.

A thing which is concluded in the Ecclesiastical Court concerning Lands, is not to be given in Evidence to Juries, for the Courts of Common Law are not to be guided by their proceedings. Mich. 22 Car. B. R.

Matter in Law. Vaughans Rep. 143.

Matter in Law is not to be given in Evidence, for the Jury are only to try matters of Fact. The adverse Party may demur to such Evidence. 3 H. 6. 36.

Ancient Writings.

An ancient Writing that is proved to have been found amongst Deeds and Evidences of Land, may be given in Evidence, although the executing of it cannot be proved, for 'tis hard to prove ancient things and finding them in such a place, by presumption, they were honestly and fairly obtained and preserved for use, and are free from suspition of dishonesty. 24 Car. B. R.

Totum & pars. A Writing or Answer permitted to be read in part, may be read in toto.

Copy of Records.

A Copy of part of a Record cannot be given in Evidence, unless 'tis proved that the part shewed in Evidence is all concerning the matter in question.

Transcript, Enrollment.

A Transcript of a Record or Enrolment of a Deed may be given in Evidene, for they are things to be credited, being made by Officers of Trust.

Council.

The Council of that Party which doth begin to maintain the Issue, whether of Plaintiff or Defendant ought to conclude.

A

A Juror who is a Witness must be also sworn in open Court to give Evidence, if he be called for a Witness; for the Court and Council are to hear the Evidence as well as the Jury. Juror.

The Jury may carry from the Bar an Exemplification under the Great Seal of Depositions in Chancery, but if they are not exemplified, the Jury can only look upon them at Bar, but not have them with them out of Court. Exemplification.

If one produce a Lease made upon an Outlawry, to prove a Title, he must also produce the Outlawry it self: but if it be to prove other matter, he needs not shew the Outlawry. And so it is of an Extent, without shewing the Statute or Judgment on which the Extent is grounded. Lease upon an Outlawry.

By Rolls an Office found after the death of a Tenant in Capite of Lands in another County, may be given in Evidence to try the Title of those Lands, if there was a special Livery granted unto the Heir. Office.

If a Witness be Bail, upon motion the Court will give leave to alter the Bayl. Stiles 385. Bail.

Debt on 5 El. 9. Because the Wife did not appear, whereas he charged her and tendred to her her charges, and though not laid what damages, yet being for the 10 l. upon the Statute, not for his damages for her not appearing, and a Feme Covert being within the Statute, 'twas held good enough, 3 Cro. 130. Leon. 122. Note, she being the person who was to appear, the charges are to be tendred to her or her Husband. Wife. Charges.

Debt

Charges. Debt for 10 l. against a Witness, upon the Statute 5 Eliz. doth not lye, unless the Witness hath his charges, and he is not bound to come without his charges first paid: but if he accepts of 12 d. and 2 pence for the rest at the Tryal, he is bound and an Action lyes against him, if he doth not come. Cro. 1 part, 522, 540. Goodwin against West.

Chaplain. A Copy of his Retainer by a Nobleman, entred in the Court of Faculties, denyed to be given in Evidence. Littleton, Rep. 1. But one that had seen to attest the Hand and Seal of the Nobleman, was allowed a good Witness, because the Plaintiff was a stranger, &c.

Quare Impedit. In Evidence, he which affirms the matter in Issue, ought first to make the proof to the Jury. ib. 36.

Counsellor. A Counsellor may be examined as a Witness against his Client, so far as it is of his own knowledge, not what his Client reveals to him, but what he knows only by his Clients information.

Counsellor. Spark against Middleton. Keeble 1 part, 505. Mr. Aylet having been Counsel for the Defendant, desired to be excused to be sworn on the general Oath, as Witness for the Plaintiff, to give the whole truth in Evidence, which the Court, after some dispute granted, and that he should only reveal such things as he either knew before he was of Counsel, or that came to his knowledge since by other persons, and the particulars to which he was to be sworn were particularly proposed, viz. What he knew touching a Will in question, and the Court only put

the

the question, whether he knew of his own knowledge, &c.

In Criminal Causes against the King, Witnesses may be sworn, unless the Crime be Capital. Criminal Causes.

Tenant at Will of part of the Lands was admitted to prove Livery of Seisin, and the execution of a Feoffment under which he held, Bulst. 1 part, 202. Tenant at will.

If one be attainted of Felony and pardoned, he shall not afterwards be sworn of a Jury, for Poena mori potest, culpa perennis erit, and therefore he not fit to serve on the Inquest, nor yet to be an indifferent Witness, and two such Persons proving a Suggestion, were rejected, and the Prohibition disallowed, Brown against Cradham, Bulst. 2 part, 154. Attainted of Felony.

In Trespass with a simul cum, if nothing be proved against them in the simul cum, they may be examined as a Witness, Stiles Rep. 401. Simul cum.

Neither he that pays or takes Collation can be a Witness in such Cases. Poors consenserns. Witnesses.

Cestuy que Trust is not to be admitted a Witness where the Title of the Land comes in question. Trust.

One who would have any Collateral Title to the Land, as if he hath a good Deed by the Ancestor who would charge the Land in the Hands of the Heir, is not to be admitted an Evidence.

But one who has an equitable Collateral Title upon the Land is admittable to be a Witness.

The

King. The Kings Meſſage or Letter ſhall not be allowed for Evidence between Party and Party; otherwiſe where the Matter was ſecret, and that the King only had Perſonal Knowledge, as in Sir George Reynels Caſe, Co. 9. Rep.

Depoſitions. Regularly the Depoſitions in Chancery of a Witneſs ſhall not be given in Evidence if he be alive, although he be beyond Sea as in Ireland, &c. otherwiſe if he be in France, or another Kingdom not ſubject to the Dominion of our King.

Paſc. 20 Car. 2. Colt verſ. Colt. Perjury. Indictment of Perjury doth not diſable a Witneſs; otherwiſe of a Conviction, whether it be by Common Law or Statute.

Sid. 269. Conſent. Upon a Motion there was a Rule made by conſent, That a Deed ſhall be allowed upon Evidence at the Aſſiſes without proving of it, which was allowed becauſe of the conſent.

Mich. 18 Car. 2 B.R. 66. Smith v. Rawlins Impropriation, Vicar. Upon Evidence at Bar it was agreed that an old Impropriation ſhall be preſumed to be well and lawfully made. A Vicar might anciently have been endowed without a Deed ſealed, being only an Ordination of the Biſhop, and Allotment of Maintenance.

Truſtee. A Truſtee cannot be a Witneſs concerning the Title of the ſame Land, the Intereſt in the Law being lodged in him.

Mic. 19 Car. 2. B. R. 67. Witneſs. By Twiſden and Windham, if an Action be brought againſt two, and no Evidence is given againſt one, he may be a Witneſs himſelf in the Caſe.

Agreed

Agreed by the whole Court, that if in Evidence the Executor give in Evidence, the Probate under the Seal of the Ordinary, nothing can be given to the contrary that he is not Executor; for Causes Testamentary belong entirely and originally to the Ordinary; and if the Will be forg'd the Suit ought to be in the Spiritual Court to repeal the Probate, according to 4 H. 7. 12. So of Letters of Administration it cannot be alledged that there was a Will; but if there be a Suit it must be in the Spiritual Court to repeal it. Yet some Books seem to the contrary, as Fitz. Estoppel 9. Bro. Testam. 4. 22 H. 6. 52. 21 E. 4. 50. a. Com. 282. 9 Co. 31. a. Old Entries 325. 1 Brownl. 79. Also upon Evidence it may be proved that the Probate or Letters of Administration were forged. Pasch. 2 Car. 1. B.R. 68. Nowel verſ. Wilſon. Will. Administration.

In Debt against the Heir upon an Obligation made by his Ancestor and J. S. jointly and severally, J. S. was sworn a Witness for the Plaintiff. Joint Obligation.

In Trespass against A. simul cum B. & C. B. & C. are admittable to be Witnesses if the Plaintiff hath not arrested them, or at the least demanded Process of the Sheriff to do it. Hill. 1651. Coram Roll. Trespass. Simul cum.

In Debt against the Heir who pleads Riens per descent, proof that the Father was seised, and that the Heir did enter after his Death, is well enough, for it shall be presumed Fee-simple till the contrary be shewn. Riens per descent.

In Debt by an Administrator upon an Obligation, the Defendant pleads Non ek Administration.

factum, the Plaintiff in Evidence need not to shew the Letters of Administration, for this is admitted by the Defendants Plea of non est factum.

Where Plaintiff or Defendant is Administrator, if the Letters of Administration bear date after the Action brought, that is well enough.

Trin. 1650. Grand Jury. A Clerk attending upon a Grand Jury shall not be compelled to be a Witness to reveal that which was given them in Evidence.

Mich. 1650. Coram Roll ad Guild-hall, Littleton verf. Poins. Private Act. Just. of Peace. The Copy of a private Act of Parliament may be given in Evidence, and if upon Collateral Issue its to be proved that such an one was Justice of the Peace, or Baronet, &c. Common Reputation is sufficient proof without shewing the Commission or Letters Patents of the Creation.

Eod. Termin. Servant. In Action upon the Case for retaining of his Servant per quod servitium amisit, the Plaintiff ought to prove that the Defendant had conusans that he was his Servant.

Hand. The Chief Justice said, If a Man be over Sea or Dead, the Party shall be admitted to prove his Hand by Witnesses, or comparing with other of his Writings, to which the Court agreed.

Perjury. Plaintiff recovers against the Defendant upon the sole Evidence of J. S. and has Judgment, and afterwards J. S. was convict of Perjury upon the same Evidence; notwithstanding the Court would not set aside the Judgment. But if it had been after Verdict that an Indictment of Perjury

jury was depending againſt J. S. the Court would have ſtopt cutting the Judgment till the Perjury tried.

If was doubted by Twiſden, that if one upon Evidence forſwear himſelf, and afterward the principal Action is annulled by Writ of Error, if afterwards he is indictable for this. Mic. 22 Car. B. R. Roy verſ. Serjant.

By Roll, If one convict of Felony be pardoned, or is burnt in the Hand, he may be a Witneſs again. Felony.

After Conviction and Clergy allowed, one is capable to be a Witneſs per Cur.

Radford brings an Action of Debt upon the Statute of 5 Eliz. cap. 9. for 10 l. againſt J.S. and declares that he was warned by Subpœna to appear ſuch a day at one of the clock in the Afternoon to be a Witneſs, &c. And upon Nil debet pleaded, the Subpœna given in Evidence was generally to appear at this day, and not at ſuch an hour; and although a Subpœna to appear at ſuch a day be of that effect, that the party ought to attend the whole day, and ſo as it was objected, includes that he ought to appear at this hour, yet in reſpect of the variance it cannot be ſaid to be the Subpœna on which the Plaintiff did declare, and therefore he was non-ſuited, and in this caſe no regard was had to the Ticket left with the Defendant, which was according to the Declaration. 24 Car. 1. Radfords Caſe. Subpœna.

In an Action brought by a Woman for ſlandering of her, by which ſhe loſt her Marriage with J. S. the Marriage with J.S. is Marriage. Starch verſ. Ely, 24 Car. Rot. 494.

is not traverſable, but ought to be proved in Evidence.

Tithes. Crawly verſ. Thorne, Mich. 22 Car. 2.

In Debt for Tithes, if the Plaintiff declares that he is Proprietor of a Farm, its ſufficient, and may give his Title in Evidence.

Guardian.

Guardian in Socage ſhall be admitted to be a Witneſs for the Infant, for he is accountable.

Record. Lawrence verſ. Key.

A Copy of a Record is not true, unleſs it be tranſcribed in the ſame Language, and therefore a Tranſlation ſhall not be given in Evidence, as where the Record is in Latin and the Copy in Engliſh.

Copy-hold.

A Copy of Copy-hold Lands may be given in Evidence where the Rolls are loſt, or not loſt, Mich. 15 Car. 2. B. R. Snow verſ. Cutler.

Mic. 16 Car. 2. B. R. Depoſitions. Bankrupt. Coroner.

Note, That the Depoſitions taken before the Commiſſioners of Bankrupts ſhall not be uſed as Evidence at a Trial, although the Witneſſes be dead: But Depoſitions taken before the Coroner, with proof that the party that made them is dead, ſhall be good Evidence, as it was ruled in the Caſe of the King and Browning, Paſch. 18 Car. 2. B. R.

Copy of a Recovery.

A Copy of a Recovery after long debate ſuffered to be given in Evidence, the Recovery it ſelf being burnt.

Exemplification.

And Hale ſaid the Exemplification of a Record under the Mayor of Briſtol's Hand was allowed for Evidence, Modern Rep. 117. Green and Proud's Caſe.

On

On an old Recovery the Court allowed it, though no Tenant to the Præcipe could be proved, but it ſhall be intended, 2 Cro. 455. Mod. Rep. 117.

A Truſtée may be a Witneſs againſt his Truſt, by Hale Chief Juſtice; but Twiſden doubted thereof. Truſtee.

A Guardian in Socage ſhall be admitted to be a Witneſs for the Infant, for he is accountable. Guardian.

Actual priſel eſt bone Evidence de prover Converſion ſans demand, Siderf. 264. Trover.

Caſe in a feigned Iſſue out of the Chancery to try the Forgery of a Will of Sir —— Cuts, whereby he gave to his Coſin Dorothy, now Pickerings Wife, ſuch Lands for 99 years, wherein it was ſaid, That if ſhe ſo long live was raſed out, and ſo made abſolute for ſo many years. And one Mr. Baker was called a Witneſs for the Plaintiff, who deſired the direction of the Court whether he ſhould be ſworn, becauſe he was Solicitor in the Caſe for the Defendant. The Court ſaid, That about the Matter before he was imployed he is to be ſworn; but we will not examine him about any Privacies in what he is imployed ſince that time; And Mr. Attorny General ſaid he demurred in Chancery for the ſame Cauſe, and was overruled to be examined. And it was held a Man cannot give in Evidence an Hearſay, though the Man be dead; but a Man may give in Evidence an Hearſay of an Act at the preſent time, thereby to fortifie and corroborate what the other ſays. Cuts verſ. Pickering, B.R Paſc. 24 Car. 2 Solicitor. Hearſay.

Pasc. 27 Car. 2. in B. R. --- verf. Cotewell.

In Ejectione, upon Not Guilty, upon Evidence to the Jury at the Bar, the Case was such, That Cotewell had a Lease for years of the Prebend of Sutton Regis in the County of Bucks, made in the time of H. 8. and being expired, he now claimed under a Lease from a Nominal Prebendary thereof founded in the Cathedral of Lincoln: But the Plaintiff claimed by Letters Patents thereof from King James, made the 7th of King James to Vicent and his Heirs, who granted the same to the Widow of Sir W. Rawleigh and her Heirs, whose Daughter and Heir Sir Jervis Elwaies married; and the Possession was according to this Grant; Whereupon the question was if they ought to shew how it came to the Crown. Hale Chief Justice said, That the Statute for confirmation of Patents, Jac. takes notice that Prebend did come to the King. And in Edw. 1st. time was a device, that all that claimed Terra Regis should shew how it came to the Crown, which often vanished away. And in late Times, in a Trial at this Bar, Pr. Latch. did non-suit the Plaintiff upon the claim of Monastery Lands, although he proved the House had it, because he did not make out how it came to the House; but since that time the Court have intended it well come to the House, the Possession having went accordingly with it: And he said he was of Council in a Trial at Bar for an Impropriation, where it was insisted that it was presentative till Edw. 4th's Time, and could not be appropriated without the King's Licence,

Monastery Lands.

Possession.

Licence, quod Curia concessit, and he could not produce the Licence, yet because it was enjoyed ever since Edw. 4th's Time as appropriate, the Court did intend a Licence, and that the Patent was lost before the Enrolment, and accordingly the Verdict went then. The Defendant offered to read a Copy of a Lease out of the Leiger Book of the Dean and Chapter of Lincoln, but it was disallowed by the Court, for the Book it self is but a Copy, and a Copy of a Copy is no Evidence. And in this Case the Court did presume the Grant to King James to be lost, and thereupon Judgment was for the Plaintiff. Copy of a Leiger Book.

A Poor House-keeper may not be a Witness for the Hundred in a Robbery, Modern Rep. 73. Robbery.

Entry and Suspension may be given in Evidence upon Nil debet pleaded, Modern Rep. 35. per Twisden, and Browns Case 118. Nil debet Rent.

Fresh Suit may be given in Evidence in an Action of Debt for an Escape on Nil debet pleaded, per Hale and Wild contra Twisden. Hale said he always allowed it, and so said Wild Justice, Modern Rep. 116. Mosedals Case. Escape.

One Coparcener not to be Evidence for another in Ejectment, because she claims by the same Title, though not Party to the Suit. But the Daughter of her Sister may be sworn, for although she should be Heir, yet her Mother may give the Lands to whom she Will, being Fee-simple. Pasc. 13 Car. 2. B. R. Truel, vers. Castel., Coparcener.

Ibid. Decree. A Decree produced in Paper is not to be given in Evidence without Bill and Answer, per Twisden. Otherwise if not in Paper.

Ibid. A printed Copy of an Act of Parliament is not to be given in Evidence, if not examined by the Rolls and sworn.

Acts of Parliament. A private Act that concern'd Rochester-Bridge, though printed by Rastal was not allowed in Evidence, not being examined by the Record. Otherwise of General Statutes, there the printed Book is good Evidence. Lamberts Perambulation, Co. Rep. and F. N. B. are good Evidence, 3 Keeble 91.

King. Witnesses may be sworn against the King in Criminal Causes, not in Capital, Rex vers. Percival, Hill. 15 and 16 Car. 2. B. R.

Book. Crouch and Drury, Pasch. 13 Car. 2. B. R. A Mans Book of Accounts is no Evidence for the Owner of the Book, but for the adverse Party, for his Book cannot be of better Credit than his Oath, which would not serve in his own Case, Ergo.

Copy. Deed. A Copy of a Deed is good Evidence where the Defendant has the Deed and will not prove it, per Vernon Justice, Clay. Rep 15. Modern Rep. 4. 266. 2 Keeble 483, 540. Moor 297.

Copy. Lease. Copy of a Counterpart of a Lease, the Lease being lost, given in Evidence and allowed, Mich. 15 Car. 2. Stroud vers. Dr. Holt, B. R.

Deed. Seals. Though the Seals be broken off a Deed, yet the Deed may be given in Evidence, Modern Rep. 31.

De-

Defendant claimed by Patent to Vanlore in 22 Jac. tot talia tanta &c. (as Dyer) the Duke of Somerset, or Abbey of D. had them; And though by way of Pleading a lawful Wlage be sufficient, yet on Issue thereon, or in any Evidence it may appear that the Duke or the Abbey had a substantive of bona & catalla Felonum, by Hales Chief Justice and the whole Court: For most Grants of Abbey Lands as these are Relative, and no substantive Grants appearing, the other Evidence was disallowed, especially for that the Duke of Somerset was attainted, and so his Privileges thereby extinct, unless regranted, 3 Keeble 456. in Sandford and Clerks Case, Moor 297. Patents. Tot talia tanta &c.

Lamberts Perambulation, Co Rep. F. N. B. are good Evidence. Rastals Statutes are good Evidence of General Statutes, but not of private Acts. Perambulation. Statutes.

Deed with Seals torn off admitted to declare use of a Recovery, Palmers Rep. 403. See Modern Rep. Tit. Evidence. Deed. Seals.

Legatee or Devisee of an Annuity may be an Evidence to prove the Will, if he hath received it, or released it; and this though after the Action commenced. Siderf. Rep. 315. Will.

The Cirograph of a Fine may be given in Evidence, but not given to the Jury; but a Recovery may be delivered in Evidence, 2 Siderfin 145, 146. Plow. Com. in Scholasticas Case 410. Fine. Recovery.

Recovery in value in Evidence may be given in Evidence, 2 Sid. 145.

Decree

Decree. Decree in Chancery is not Evidence at Common Law, 2 Sid. 75.

Parishioners. Parishioners may be Witnesses to a Devise, by which a Parish claims Lands to the Relief of the Poor, 2 Sid. 109.

Bill. Bill in Equity is no Evidence against the Plaintiff. Mar.

Equitable Interest. An Interest in Equity disables a Man to be a Witness, 2 Keeble 345.

Escape. Upon a Trial at Bar it was agreed that in Debt upon an Escape, and nil debet pleaded, Repitial upon Fresh Suit may be given in Evidence by the Defendant in excuse of the Action.

Foreign Attachment. Custom of Foreign Attachment may be pleaded or given in Evidence, 3 Keeble 221.

Creditor. After four Months that a Dividend is made a Creditor is a good Witness, for no other Dividend shall be intended, 3 Keeble 348. Bents and Mico.

Mic. 22 Car. 1. Continuando. For making a Trespass Continuando there ought to be a Re-entry of the Plaintiff, and for the not making thereof, the Plaintiff shall have Damages only for the first Entry.

Will. A Will under which a Title to Land is made to the Plaintiff must be shewn it self to the Court, and the Probate it self is not sufficient, 1 Keeble 117. Trial per Pais 215. The same Case cited 2 Roll 678. between Bret and Bret, 10 Car. 1.

Pasch. 1651. Will. The Copy of a Will according to the Book of the Register in the Court Christian shall not be admitted to prove a Will of Lands, except the Possession has gone a-long time accordingly.

2 Roll

2 Roll 678. adjudged, That Probate of a Will by Witneſſes for Lands is not Evidence at Common Law, although the Probate was good as to the Perſonal Eſtate deviſed, between Bret and Bret, Hill. 10 Car. 1. Probate.

Upon Plene adminiſtravit pleaded, the Account given to the Ordinary ſhall not be given in Evidence, nor any reſpect to it, 2 Roll 678. Turvies Caſe, Paſch. 7 Jac. per Cur. Plene Adminiſtravit.

Recital of a Patent in another Patent is no Evidence of the recited Patent, 2 Roll 678. Trial per Pais 232, 235. Hardres 323. Recital.

If a Witneſs be convicted of Felony, and afterwards pardoned, whether he ſhall be thereby reſtored to be a good Witneſs. And Scrogs Chief Juſtice, and Raymond Juſtice were of Opinion that he could not, becauſe the Pardon doth take away the Puniſhment due to the Offence, but cannot reſtore the Perſon to his Reputation; and of that Opinion was Juſtice Nichols, Moor 872. in Cuddington and Wilkins Caſe; But Juſtice Jones and Juſtice Dolbin cont. And afterwards Raymond was of their Opinion: For in Roberts Reports of Cuddington and Wilkins Caſe its ſaid that the Pardon takes away not only poenam but reatum. Another quære was, Whether a Man convicted and burnt in the Hand be ſtigmatized as to his Teſtimony: And Jones Juſtice held he is not, becauſe the burning in the Hand is no parto f his Judgment; and is by 4 H. cap. 13. only to notifie to the Judge that he hath had his Clergy before, Mrs. Celiers Caſe, Paſc. 32. Car. 2. B. R. Felons. Pardons.

before, 5 Co. 50. a. Biggin's Case. But having examined the Case, do find no Judgment given therein, but compounded as its reported both 3 Cro. 682. and by Moor 571. And Cro. says there were two Judges against two. And Moor says it was agreed the King could not pardon the burning in the Hand in an Appeal; and in truth it seems to be part of the Judgment, for the Entry is, Ideo consideratum est quod le Offender cauterizetur in manu sua leva. Rast. Entries, 1. b. 56. a. But upon the whole matter it appears by Heston's Case, cited in Foxley's Case, 5 Co. 110. That the burning in the Hand is (by virtue of 18 Eliz. cap. 6. which saith the Prisoner shall be forthwith enlarged) in the nature of a Pardon.

Trin. 32 Car. 2. B. R. en Count de *Castlemains* Case, for intending to kill the King.

Dangerfield was produced as a Witness, who had been found Guilty of several Indictments of Felony for which he had his Clergy, and was burnt in the Hand. And upon other Indictments he had been on the Pillory for cheating, but had obtained his Pardon under the Great Seal for all his said Offences. A Question did arise, whether he might be a Witness: and thereupon the Prisoner did desire to have Counsel assigned him, and it was granted. And Darnel one of his Counsel urged, that Dangerfield ought not to be a Witness, for he was blemished, and the Pardon had not restored him, and cited 2 Brownl. 7. where its said, that the King pardoned a Man attainted for giving a false Verdict, that he shall not be at another time impannelled upon a Jury; for though the punishment were pardoned,

doned, yet the guilt remains. 2 Bulstr. 154. Brown versus Crashaw. In a Prohibition, the Suggestion was proved only by two persons attainted of Felony. And Coke Chief Justice cited Hill. 11 H. 4. 41. b. Pl. 7. That if a Man be attainted of Felony and pardoned, he shall not after be sworn upon a Jury, because he is not probus & legalis homo. But the Court willing to be throughly satisfied, sent Justice Raymond to the Court of Common-Pleas to know their Opinion in this point; and the Judges there resolved, That the burning in the Hand was quasi a Statute pardon as to the Felony, and as to that he was a good Witness, and the Kings Pardon made him a good Witness as to the other Offences, but they said, had he not been burnt in the Hand, the Pardon would not have restored him to his Credit again, because in his Testimony the People are concerned, and consequently the Pardon will not deprive them of their Interest. And thereupon the Judges here allowed him to be a good Witness; and with the Opinion of the Judges of the Common-Pleas, as to the burning of the Hand agree the Books of 5 Co. 110. a. Heston's Case. Hob. 292. and Hob. in Cuddington versus Wilks. But Moor 872. says Justice Nichols was of Opinion, That if the Plaintiff had been convicted, the Judgment would have been otherwise. But Castlemain was found not Guilty on the whole matter.

Clergy.

Pardon.

Upon the Statute of Huy and Cry, at a Tryal some Housekeepers appeared as Witnesses, that lived within the Hundred, who being

Robbery.

being examined, said they were poor and paid no Taxes or Parish Duties. And the Query was, whether they were good Witnesses? Twisden went down from the Bench to the Judges of the Common-pleas for their Opinions, who said, Judge Wild was confident that they ought not to be sworn, but Judge Tyrrel doubted, but after was of the same Opinion, because when the Mony is recovered against the Hundred to be levied they might be worth something. Mich. Rep. 74.

Parishioner. It was held in the Case of Meredith against the Hundred of Warlington Pasch. 1655. That a Parishioner is not a competent Witness to prove the Bounds of a Parish where he is an Inhabitant, although he pay neither Scot nor Lot, but receives Alms of the Parish, because he is subject to the Watch and Ward, and so is concerned something, though not so much as others: Sty. N. P. R. 571, 572.

Pedigree. Upon Evidence to a Jury to prove J. S. to be Heir to W. S. the Court would not accept the Pedigree drawn by an Herald at Arms for Evidence, nor would suffer the Jury to have it with them, but 'tis only information for direction. Pasch. 8 Jac. B. R. Sir Edward Plumpton and Robinson. 2 Roll. 687.

Pardon. If one be attainted of Felony and pardoned, he cannot be either Juror or Witness.

Felons. Contra per Coke. 2 Bulstr. 154. Brown and Crashaw. Nor can a Recusant Convict be a Witness, for he is a person Excommunicate. Co.

Excommunicate.

At a Commission of Review, in the Case between Bray and Whitehay, concerning the Will of Mr. George Bray of Lincolns-Inn, who gave thereby all his Estate to a Woman he kept, and made her his sole Executrix, and waived his Brother: It was said by Justice Ellis, That it was resolved by the whole Court in the Case of Dutton upon a Tryal at Bar, concerning a Will forged by Mr. Colt, that Depositions taken in Chancery, in perpetuam rei memoriam, upon a Bill for that purpose Exhibited, cannot be given in Evidence at a Tryal at Law, unless there be an Answer put in and produced; and so he said he hath known it several times resolved, both in B. R. and C. B. See Hardres Rep. Wat's Case. Depositions in *perpetuam rei memoriam.*

In an Information against P. That whereas he had cheated one Lee in a Match, to the intent that the Lands of this Lee should be charged before Marriage, he procured the Feme to acknowledge a Judgment to him, where in truth no Debt was due by the Feme; in this Case the Feme was admitted a Witness for the King, though the profit of the Husband was collaterally concerned, for by this Evidence if it be found against P. the Judgment shall be set aside. Mich. 21 Car. 2. B. R. The King against *Paris.* Feme covert.

A Trustee may be a Witness if he release his Trust, so if he be in possession of the Lands in question as Servant. Siderfin 315. Trustee.

In an Information of Forgery for publishing a forged Deed, importing the revocation of a Will, to the prejudice of the Executors and Legatees; 'twas resolved by all Trustee. Legatee.

the

the Barons of the Exchequer, upon conference with the Judges of the Kings-Bench, First, That a Trustee who has conveyed over his Estate in Trust, or has assented thereunto, cannot be a Witness for the King in this Case, nor can a Legatee, nor any other person that is a loser by the Deed, or may receive any advantage by the Verdicts being found for the King. Hardres Rep. 331. Not's Case.

But in Deceit for forging a Will, a Legatee was allowed and sworn as a Witness in the Tryal for the Forgery, for this makes nothing to the probate of the Will, or Recovery of the Legacy in the Spiritual Court, nor do they take notice of it.

Indeb. assump. Account. Matters that lye in Account are not to be given in Evidence on an Indebitatus Assumpsit, per North Chief Justice, Modern Rep. 270.

Payment. In an Action of Assumpsit, grounded upon a promise in Law, payment may be given in Evidence, but not where the Action is grounded upon an express promise. Modern Rep. 210.

Record. In Trover for Goods, the proof depended on a Fieri Facias, and venditioni exponas, which could not be found on Record, and admitted to be proved in Evidence, Hardres Rep. 323, 324.

Ejectment. A Verdict for a Lessee, is good Evidence for the Reversioner in an Ejectment. Hardres Rep. 472.

Secus in case of Depositions for the Lessee, the Reversioner without being Party to the

Suit

Suit, can have no advantage, 472, 473. ibid.

The Act of general Pardon cannot be given in Evidence on non debet modo & forma, but ought to be pleaded, for that it is not the general Issue within the intent of the Act. Hardres Rep. 421. *Non debet.* General Pardon.

In an Action on the Case, when the Request is laid at one time in the Declaration, a request at another time may be given in Evidence. Sid. Rep. 268. Request. Another day.

It was resolved in one Long's Case, that upon an Information upon the Statute of Usury, the person who borrows the Mony may be a Witness after he hath paid the Mony, but not before. Mich. 22 Car. 2. B.R. per Twisden Justice. Usury. *Per Twisden* Justice, 22 Car. 2. B.R.

If an ancient Deed of Feoffment be shewn but no Livery upon it, if possession have gone along with the Deed, this is good Evidence to a Jury to find Livery. Roll. 1 Rep. 132. Feoffment. Livery.

If a Condition be to pay Mony at a certain day and place to avoid a Feoffment, acceptance before the day although he make an Acquittance, doth not maintain the Issue joyned on payment at the day and place. Moor 47. Payment at the day.

If A. indite B. on the Statute 5 Eliz. c. 9. of Perjury, as a party grieved, the prosecutor cannot be a Witness against B. Roll. 685. 2 part. Perjury. Prosecutor.

Evidence may be given to mitigate Damages, in all cases where Damages are to be recovered, as in Wast, that the Premisses were ruinous at the time, &c. or burnt

by Enemies, &c. See Olive and Gwin's Case, in Siderfin 2 part, 145. in the Exchequer; good matter concerning Evidence, where 'twas adjudged, that a Record had in Brecknock in Wales, under the Seal of Brecknock, might be given in Evidence. See Hardres Rep. 118.

Perjury. Judgment stayed, because the Verdict was laid upon the testimony of one Witness, and he since convict of Perjury in the same thing. Pas. 17 Car. 2. B. R.

Two Witnesses. There ought to be two, where the Tryal is by Witnesses.

CAP. XII.

The Juries Oath; why called Recognitors in an Assise, and Jurors in a Jury. Of the Tryal *per medietatem linguæ*; when to be prayed and when grantable. Of a Tryal betwixt two Aliens, by all English. Of the *Venire facias, per medietatem linguæ*, and of Challenge to such Juries.

Assise, Enquest and proof, are taken for the word *Jury*. *Vide* 28 E. 3: 13.

THE Jury having heard their Evidence, let them now consider of their Verdict: But first they must remember their Oath, which in effect is, To find according to their Evidence, and therefore they should have had

had it before the Evidence, but that the form and order of the Venire facias (which I have tyed my self to follow) leads me to it after their Evidence, in these Words, Ad faciend. quandam Juratam; I have already shewed the derivation of this Word Jurata, and what is the legal acceptation of it; only observe with our Great Master Littleton, That the Word Assise is sometimes taken for a Jury, so as the Learned Commentator doth well Paraphrase, That the Word Assise is Nomen Æquivocum Æquivocans, because sometimes it signifieth a Jury, sometime the Writ of Assise, and sometime an Ordinance or Statute; but Jurata, is Nomen Æquivocum Æquivocatum because we always understand that Word (according to the aforesaid definition to be a Jury of Twelve Men, so called, by reason of the Oath they take, Truly to try the Suit of Nisi prius, between Party and Party, according to their Evidence.

See Chap. 1.

1 Inst. 154.

Assisa for Jurata.

The Juries Oath.

And as in an Assise, the Jurors are called Recognitors, from these words in the Writ of Assise, facere Recognitionem; so upon a Nisi prius, they are called Juratores, from these words in the Venire facias, Ad faciend. quandam Juratam.

Why called Recognitors in an Assise, and Jurors in a Jury.

In ancient time, the Jury, as well in Common-Pleas, as in Pleas of the Crown, were twelve Knights, as appears by Glanvil, Lib. 2. Cap. 14. and Bracton, f. 116.

12 Knights.

The next words of the Venire facias, are Inter partes prædictas. In the fourth Chapter, I have instanced, That in some Cases, a Jury shall be awarded betwixt the party,

and a Stranger to the Writ and Iſſue; I will now ſhew what the Jury ſhall be, when one of the Parties is an Alien, the other a Denizen; and when both Parties to the Iſſues are Aliens.

Jury per medietatem linguæ.

This Tryal is called in Latin, Triatio bilinguis, or per medietatem linguæ. And this Tryal by the Common Law was wont to be obtained of the King, by his Grant made to any Company of Strangers, as to the Company of Lumbards or Almaignes, or to any other Company, that when any of them was impleaded, the Moiety of the Inqueſt ſhould be of their own Tongue, Stanf. Plea, Cor. Lib. 3. Cap. 7.

2 Keb. 315.

Its Antiquity.

And this Tryal in ſome Caſes, per medietatem linguæ, was before the Conqueſt, as appears by Lamb. f. 91. 3. Viri duodeni Jure conſulti, Angliæ ſex, Walliæ totidem, Anglis & Wallis jus dicanto. And of ancient time, it was called Duodecimvirale Judicium. 1 Inſt. 155.

But afterwards this Law became univerſal: Firſt by the Statute of 27 Ed. 3. c. 8. It was Enacted, That in Pleas before the Mayor of the Staple, if both Parties were Strangers, the Tryal ſhould be by Strangers. But if one Party was a Stranger and the other a Denizen, then the Tryal ſhould be per medietatem linguæ. But this Statute extended but to a narrow compaſs, to wit, only where both Parties were Merchants or Miniſters of the Staple, and in Pleas before the Mayor of the Staple: But afterwards, in the twenty eighth year

of

of the same King's Reign, Cap. 13. It was Enacted,

That in all manner of Enquests and Proofs, which be to be taken or made amongst Aliens, and Denizens, be they Merchants or other, as well before the Mayor of the Staple, as before any other Justices or Ministers, although the King be Party. The one half of the Enquest or Proof shall be Denizens, and the other half Aliens, if so many Aliens and Foreigners be in the Town or Place, where such Enquest or Proof is to be taken, that be not Parties, nor with the Parties in Contracts, Pleas, or other Quarrels, whereof such Enquest or Proof ought to be taken: And if there be not so many Aliens, then shall there be put in such Enquests or Proofs, as many Aliens, as shall be found in the same Towns or Places, which be not thereto Parties, nor with the Parties, as aforesaid is said, and the Remnant of Denizens which be good Men, and not suspicious to the one Party nor to the other.

So that this is the Statute which makes the Law universal, concerning the medietatem linguæ; for though the King be Party, yet the Alien may have his Tryal. And it matters not, whether the Moiety of Aliens be of the same Country as the Alien Party to the Action, is't; for he may be a Portugal and they Spaniards, &c. because the Statute speaks generally of Aliens. See Dyer 144. King.

Venire facias, per medietatem linguæ.

And the form of the Venire facias in this Case is De vicinet. &c. Quorum una medietas sit de Indigenis, & altera medietas sit de alienigenis natis, &c. And the Sheriff ought to return twelve Aliens and twelve Denizens one by the other, with addition which of them are Aliens, and so they are to be sworn. But if this Order be not observed, it is holpen as a mis-return, by the Statute of 18 Eliz. Cro. 3 part, 818, 841. So that Brook says, it is not proper to call it a Tryal, per medietatem linguæ, because any Aliens of any Tongue may serve. But under his favour I think it proper enough.

For People are distinguished by their Language, and Medietas Linguæ, is as much as to say, half English and half of another Tongue or Country whatsoever. Though it be not material of what substistency the Jurors are, yet the form of the Venire facias, shall not be altered, but the Clause of Quorum quilibet habeat, 4 l. &c. shall be in. Cro. 3 part, 481.

But suppose that both parties be Aliens, of whom shall the Inquest be then? It is resolved, that the Inquest shall be all English; for though the English may be supposed to favour themselves more than Strangers, yet when both parties are Aliens, it will be presumed they favour both alike, and so indifferent. 21 H. 6. 4. But if the Plea be before the Mayor of the Staple, and both parties Alien Merchants of the Staple, it shall be tryed by all Aliens. Stamford's Pleas del Corone, 159. A Scotchman is a Subject

and

and ſhall not have this Tryal. Egyptians are alſo excluded, when tryed for Felony made by the Statute againſt them, 1 Phil. and Mar. Cap. 4. 5 Eliz. Cap. 20.

All Engliſh.

Where an Alien is party, yet if the Tryal be by all Engliſh, it is not erroneous, becauſe it is at his peril, if he will ſlip his time; and not make uſe of the advantage which the Law giveth him when he ſhould. Dyer 21.

When the Alien ſhould pray a *Venire facias per medietatem.*

The Alien ought to pray a Venire facias, per medietatem linguæ, at the time of the awarding the Venire facias: But if he doth it at any time before a general Venire facias be returned and filed, the Court may grant him a Venire facias de novo. Dyer 144. 21 H. 7. 32. though it hath been queſtioned.

Tales.

But if he hath a general Venire facias, he cannot pray a Decem Tales, &c. per medietatem linguæ, upon this; becauſe the Tales ought to purſue the Venire facias. 3 E. 4. 11, 12. And ſo if the Venire facias be per medietatem linguæ, the Tales ought to be per medietatem linguæ; as if ſix Denizens and five Aliens appear of the principal Jury, the Plaintiff may have a Tales, per medietatem linguæ, Li. 10. 104. But if in this caſe the Tales be general, de circumſtantibus, it hath been held good enough; for there being no exception taken by the Defendant, upon the awarding thereof, it ſhall be intended well awarded. Cro. 3 part, 818, 841.

Where the Tryal of an Aliens cauſe ſhall be by Engliſh.

If the Plaintiff or Defendant be Executor or Adminiſtrator, &c. though he be an Alien, yet the Tryal ſhall be by Engliſh becauſe he ſueth in auter droit; but if it be averred that the Teſtator or Inteſtate, was an Alien, then it ſhall be per medietatum linguæ, Cro. 3 part, 275.

Part Engliſh and part.

Mich. 40 and 41 Eliz. The Queens Attorney exhibited an Information againſt Barre, and divers other Merchants, ſome whereof were Engliſh, and ſome Aliens: After Iſſue, the Aliens prayed a Tryal per medietat. Linguæ. But all the Juſtices of England reſolved, That the Tryal ſhould be by all Engliſh, and likened it to the Caſe of Priviledge, where one of the Defendants demands Priviledge, and the Court, as to his Companion cannot hold Plea, there he ſhall be ouſted of his Priviledge, ſic hic. More 557.

By the Statute of 8 H. 6. Cap. 29. Inſufficiency or want of Freehold is no cauſe of Challenge to Aliens, who are impanneled with the Engliſh, (notwithſtanding Stamford's Opinion, Pl. Coron. 160.) for this Statute ſaith, That the Statute 2 H. 5. 3. ſhall extend only to Enqueſts betwixt Denizen and Denizen.

If the Defendant do not inform the Court that he is an Aliens, upon awarding the Venire facias, and ſo pray a Venire facias per medietatum linguæ; he cannot challenge the Array for this cauſe at the Tryal, if the Jury be all Denizens (notwithſtanding Stamford's Opinion to the contrary, and the Books cited by him, fol. 159. Pl. Cor.)

For

for the Alien at his peril should pray a Venire facias, per medietatem linguæ. Dyer 357. Vide Rolls tit. Tryal 643.

If the Plaintiff be an Alien, he must suggest it before the awarding of the Venire facias; but if the Defendant be an Alien, the Plaintiff is allowed to surmise that, before or after the Venire facias, because the Defendants quality may not be known to him before. 27 H. 7. 32.

If the Defendant be an Alien, on notice given by his Attorney, to the Plaintiff or his Attorny, the Plaintiff ought to enter it on the Roll, to have a Tryal de medietate at his peril; but the Court refused to award it for the Defendant, on his Affidavit that he is an Alien, Keeble 1 part, 547.

CAP.

CAP. XIII.

The Learning of General Verdicts, Special Verdicts, Privy Verdicts, and Verdicts in open Court; and where the Inquest shall be taken by default. Inquests of Office, &c. Arrest of Judgment, Variance betwixt the Nar. and the Verdict, &c.

Verdict.

VErdit or Verdict, In Latin, Vere dictum, quasi dictum veritatis, as Judicium, est quasi Juris dictum; Is the Answer and Resolution of those twelve upon, concerning the matter of Fact referred to them by the Court, upon the Issue of the Parties. And this is the foundation upon which the Judgment of the Court is built, for ex facto jus oritur; the Law ariseth from the Fact; wherefore it is no wonder, that the Law hath ever been so curious and cautelous, as not to believe the matter of Fact, until it is sworn by twelve sufficient

The credit of Verdicts.

men of the Neighbourhood where the Fact was done, whom the Law supposeth to have most cognizance of the truth or falsehood thereof, which being sworn (for the words are, Juratores prædict. dicunt super sacram. suum, &c.) is the Verdict whereof we now treat: And such credit doth the Law give to Verdicts, that no proof will be admitted

ter to impeach the verity thereof, so long as the Verdict stands not reversed by Attaint. And therefore upon an Attaint, no Supersedeas is grantable by Law. Plo. Com. 496.

And it is worth our Observation, that the Law seems to take more care of the Fact, than of her self; for the major part of the Judges give the Judgment of the Law, though the other Judges dissent. But every one of the twelve Jurors must agree together of the Fact, before there can be a Verdict, which must be delivered by the first Man of the Jury. 29 Assises Pl. 27.

And this Verdict is of two kinds, viz. one general, and the other special, or at large. General or special.

The general Verdict is positively, either in the Affirmative or Negative, as in Trespass, upon Not guilty, pleaded; the Jury find Guilty or Not Guilty; and so in an Assise of Novel disseisin, brought by A. against B. the Plaintiff makes his plaint, Quod B. disseisivit eum de 20 acris terræ, cum pertinentiis: The Tenant pleads, Quod ipse nullam injuriam seu disseisinam prædicto A. inde fecit, &c. The Recognitors of the Assise do find, Quod prædict. B. injuste & sine judico disseisivit prædict. A. de prædict. 20 acris terræ cum pertinentiis, &c. This is a general Verdict. 1 Inst. 228. General Verdict.

A special Verdict, or Verdict at large is so called, because it findeth the special matter at large, and leaveth the Judgment of the Law thereupon, to the Court; of which kind of Verdict it is said, Omnis Conclusio boni Special Verdict. 1 Instit. 226.

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boni & veri judicii ſequitur ex bonis & veris premiſſis, & dictis Juratorum. And as a Special Verdict may be found in Common Pleas, ſo may it alſo be found in Pleas of the Crown, or Criminal Cauſes that concern life or member.

The Court cannot refuſe it.

And it is to be obſerved, that the Court cannot refuſe a Special Verdict, if it be pertinent to the matter in Iſſue. 1 Inſt. 228.

A ſpecial Verdict may be found upon any Iſſue, as upon an *abſq; hoc, &c.*

It hath been queſtioned, whether the Jury could find a Special Verdict, upon a ſpecial point in Iſſue, or no, as they might upon the general Iſſue. But this queſtion hath been fully reſolved in many of our Books; firſt in Plo. Com. 92. It is reſolved, That the Jury may give a ſpecial Verdict, and find the matter at large, en cheſun iſſue en le monde, ſo that the matter found at large, tend only to the Iſſue joyned, and contain the certainty and verity thereof. Lib. 9. 12.

And in 2 Inſt. 425. upon Collection of many Authors, it is ſaid, That it hath been reſolved, that in all Actions, real, perſonal and mixt, and upon all Iſſues joyned, general or ſpecial, the Jury might find the ſpecial matter of fact, pertinent, and tending only to the Iſſue joyned, and thereupon pray the diſcretion of the Court for the Law. And this the Jurors might do at Common Law, not only in Cafes between party and party, but alſo in Pleas of the Crown, at the Kings ſuit, which is a proof of the Common Law. And the Statute of Weſtminſter, the 2 Cap. 30. is but an affirmative of the Common Law.

And

And as this ſpecial Verdict is the ſafeſt for the Jury, 1 Inſt. 228. ſo in many Caſes it is moſt advantagious to the party, and helps him where his own pleading cannot. As for Example, ſaith Littleton, Sect. 366, 367, 368. Albeit a man cannot in any Action plead a condition, which toucheth and concerns a Freehold, without ſhewing writing of this; yet a man may be aided upon ſuch a condition, by the Verdict of twelve Men, taken at large in an Aſſiſe of Novel diſſeiſin or in any other Action, where the Juſtices will take the Verdict of twelve Jurors at large: As put the Caſe, a Man ſeiſed of certain Land in Fee, letteth the ſame Land to another, for term of life, without Deed, upon condition to render to the Leſſor a certain Rent, and for default of payment, a Reentry, &c. By force whereof the Leſſee is ſeiſed as of Freehold; and after, the Rent is behind, by which the Leſſor entreth into the Land, and after the Leſſee arraign an Aſſiſe of novel diſſeiſin of the Land againſt the Leſſor, who pleads that he did no wrong nor Diſſeiſin. And upon this, an Aſſiſe is taken. In this Caſe, the Recognitors of the Aſſiſe may ſay, and render to the Juſtices their Verdict at large, upon the whole matter; as to ſay that the Defendant was ſeiſed of the Land in his Demeſn as of Fee, and ſo ſeiſed, let the ſame Land to the Plaintiff for term of his Life, rendring to the Leſſor ſuch a yearly Rent, payable at ſuch a Feaſt, &c. Upon ſuch Condition, that if the Rent were behind at any ſuch Feaſt, at which it ought to be paid, then it ſhould be

A Freehold upon Condition, without Deed, may be found by Verdict, though it cannot be pleaded.

be lawful for the Lessor to enter, &c. By force of which Lease the Plaintiff was seised in his Demesn as of Freehold, and that afterwards, the Rent was behind at such a Feast, &c. By which the Lessor entred into the Land, upon the possession of the Lessee. And pray the discretion of the Justices, if this be a Disseisin done to the Plaintiff or not. Then for that it appeareth to the Justices, that this was no Disseisin to the Plaintiff, inasmuch as the entry of the Lessor was congeable on him, the Justices ought to give Judgment, that the Plaintiff shall not take any thing by his Writ of Assise, and so in such case the Lessor shall be aided, and yet no writing was ever made of the Condition: For as well as the Jurors may have conusance of the Lease, they also may as well have conusance of the condition, which was declared and rehearsed upon the Lease.

In the same manner it is of a Feoffment in Fee, or a Gift in Tail, upon Condition, although no Writting was ever made of it. And as it is said of a Verdict at large, in an Assise, &c. In the same manner it is of a Writ of Entry, founded upon a Disseisin, and in all other Actions where the Justices will take the Verdict at large, there where such Verdict at large is made, the manner of the whole Entry is put in Issue.

But in Assise of Rent it cannot be found to be upon Condition, unless they also find the Deed of the Condition.

ton of a Confirmation in Fee to Leſſee for years.

Per Hale Chief Juſtice, Guild-Hall, Hill. 1671. A ſpecial Verdict may be found as to Damages in an Action of the Caſe; as the Caſe was there, Viz. Pro Quer', and if ſo, &c. then ſuch Damages; if ſo, &c. then Damages ſuch; and he ſaid, he had known it ſo done in Debt, and the Damages three ways.

Alſo in ſuch Caſe, where the Enqueſt may give their Verdict at large, if they will take upon them the knowledge of the Law upon the matter, they may give their Verdict generally, as is put in their charge, as in the Caſe aforeſaid, they may well ſay that the Leſſor did not diſſeiſe the Leſſee, if they will, &c.

General Verdict.

Note the Court cannot refuſe a general Verdict, if the Jury will find it, was ſo held before Juſtice *Windham*, Lent Aſſiſes, 1681. in *Verdon's* Caſe at *Cambridge*.

The Jury may likewiſe find Eſtoppel, which cannot be pleaded as in the the ſecond Report, f. 4. it well appears, where one Goddard, Adminiſtrator of James Newton, brought an Action of Debt againſt John Denton, upon an Obligation made to the Inteſtate, bearing date the 4th day of April, Anno 24 Eliz. The Defendant pleaded, that the Inteſtate dyed before the date of the Obligation, and ſo concluded that the ſaid Eſcript was not his Deed, upon which they were at Iſſue.

And the Jury found that the Defendant delivered it as his Deed, 30th July, Anno 23 Eliz. and found the Tenor of the Deed in

hæc

hæc verba, Noverint Universi, &c. Dat. 4. Aprilis, Anno 24 Eliz. And that the Defendant was alive 30 July, Anno 23 Eliz. And that he dyed before the said date of the Obligation, and prayed consideration of the Court, if this was the Defendants Deed: And it was adjudged by Anderson Chief Justice, Windham, Periam and Walmesley, That this was his Deed, and the reason of the Judgment was, that although the Obligee in pleading cannot allege the delivery before the date, as it is adjudged in 12 H. 6. 1. Which Case was affirmed to be good Law, because he is estopped to take an Averment against any thing expressed in the Deed; yet the Jurors who are sworn ad veritatem dicend. shall not be estopped. For an Estoppel is to be concluded to speak the truth, and therefore Jurors cannot be estopped, because they are sworn to speak the truth.

Note, That a Deed may be pleaded to be delivered after the date but not before, because it shall not be intended written before the date, which may be after the date. 12 *H.* 6. 1.

But if the Estoppel or Admittance, be within the same Record in which the Issue is joined, upon which the Jurors give their Verdict, there they cannot find any thing against this, which the Parties have affirmed and admitted of Record, although it be not true; for the Court may give Judgment upon a thing confessed by the Parties, and the Jurors are not be charged with any such thing, but only with things in which the Parties vary. Ib. Lib. 5. 30.

As in Waste supposed in *A.* to plead that *A.* is a Hamlet in *B.* and not a Town of it self, admitteth the Waste, &c. 9 H. 6. 66. and the Jury cannot find no Waste, for that would be against the Record.

So Estoppels which bind the Interest of the Land, as the taking of a Lease of a Mans own Land, by Deed indented, and the like, being specially found by the Jury, the

Estoppel. 1 Cro. 110. Lib. 4. 53.

Court

Court ought to judge, according to the special matter; for albeit Estoppels regularly must be pleaded and relyed upon, by apt conclusion, and the Jury is sworn ad veritatem dicend. yet when they find veritatem facti, they perfue well their Oath, and the Court ought to judge according to Law. So may the Jury find a Warranty being given in Evidence, though it be not pleaded, because it bindeth the right, unless it be in a Writ of Right, when the Mise is joyned upon the meer right. 1 Inst. 227.

Warranty not pleaded.

Verdicts ought to be such, that the Court may go clearly to Judgment thereon, and therefore Verdicts finding matter incertainly, or ambiguously, are insufficient and void, and no Judgment shall be given thereupon. As if an Executor plead Plene Administravit, and Issue is joyned thereon, and the Jury find that the Defendant hath Goods within his Hands to be administred, but find not to what value, this is an uncertainty, and therefore an insufficient Verdict. Lib. 9. 74. 1 Inst. 227.

Uncertain Verdicts.

In all special Verdicts, the Judges will not adjudge of any matter of Fact, but this which the Jury declare to be true of their own finding. And therefore the Judges will not adjudge upon an Inquisition, or aliquid tale found at large in a special Verdict, for their finding of this is not an affirmation, that all which is in this is true. Siderfin 2 part, 86.

Special Verdict.

It is the Office of the Jurors, to shew the verity of the Fact, and leave the Judgment of the Law to the Court. And therefore

The Office of the Jury.

upon an Indictment of Murder, Quod felonice percuſſit, &c. If the Jury find percuſſit tantum, yet the Verdict is good, for the Judges of the Court are to reſolve upon the ſpecial matter, whether it was felonice, and ſo Murder, or not, Lib. 9. 69. And if the Court adjudge it Murder, then the Jurors in the concluſion of their Verdict, find the Felon Guilty of the Murder contained in the Indictment.

Verdict finding part of the Iſſue.

A Verdict that finds part of the Iſſue, and finding nothing for the reſt, is inſufficient for the whole, becauſe they have not tryed the whole Iſſue wherewith they are charged: As if an Information of intruſion be brought againſt one, for intruding into a Meſſuage and an hundred Acres of Land: upon the general Iſſue, the Jury find againſt the Defendant for the Land, but ſay nothing for the Houſe, this is inſufficient for the whole.

More 406.

Finding more than the Iſſue.

But if the Jury give a Verdict of the whole Iſſue, and of more, &c. that which is more is ſurpluſage, and ſhall not ſtay Judgment: For Utile per inutile non vitiatur. Leon. 1 part, 66. Cro. 1 part, 130. But neceſſary incidents required by Law, the Jury may find. Siderfin 232.

Where fatal. Siderfin 96. Keeble 1 part, 289.

If the Iſſue be upon a deſcent, and the Jury find the ſame, and a continual claim, that as to the continual claim is ſurpluſage, 7 H. 6. 8, 9, 10.

In ſome Caſes the Verdict may be found for the Plaintiff, and yet he ſhall be barred.

As

As 40 Aſſ. 6. in a Mortdanceſter, all the points of the Writ found for the Plaintiff and yet he was barred for this reaſon, for although he was Heir to his Father, yet becauſe the elder Brother by the half blood did enter, he was barred. Barred.

Yet in many Caſes, nay almoſt in all the Jury ought to find more than is put in Iſſue, otherwiſe their Verdict is not good; and therefore they are to aſſeſs Damages and Coſts, becauſe it is parcel of their charge, as a conſequent upon the Iſſue, though it be not part of the Iſſue in terminis, Lib. 10. 119. Where the Verdict ought to be of more than is in the Iſſue.

A Verdict muſt be ſufficient in matter and form, be the ſame ſpecial or general, and therefore they muſt lay Damages and Coſts where the ſame ought to be found.

An Action of the Caſe on Deceit was brought, for that he ſold unto the Plaintiff two Oxen, and warranted them to be ſound; on not Guilty, the Jury found him Guilty as to one, and not Guilty to the other, and good; for that the Action was founded not on the Contract, but the Deceit. 3 Cro. 884. Gravenor and Mete.

In Debt the Plaintiff declares that he had Judgment againſt Baron and Feme for a Debt of the Wives, dum ſola, &c. that they were in Execution and ſuffered to Eſcape, the Jury found the Husband only in Execution and eſcaped, and Judgment for the Plaintiff. Roberts verſus Herbert, Hill. 12 Car. 2. C. B.

Damages by the first Inquest.

So in Trespass against two, one comes and pleads Not Guilty, and is found guilty. In this Case, the first Inquest shall assess Damages for the whole Trespass, by both Defendants; and afterwards the other comes and pleads Not Guilty, and is found guilty: The finding of Damages by the first Inquest, to which he was not party, shall bind him; and therefore if the Damages are outragious, and excessive, the Defendant in the last Enquest shall have an Attaint. Lib. 10. 119.

Attaint.

So in Trespass Quare clausum fregit, if Issue by joyned upon a Freehment, and the Jury give outragious Damages, an Attaint lies; for the inquiry of Damages is consequent and dependent upon the Issue, and parcel of their charge. Ibid.

Damages by the first Inquest.

In the 11th Report, fo 5. It was resolved, That in Trespass against two, where one comes and appears, &c. against whom the Plaintiff declares with a simul cum, &c. who pleads and is found Guilty, and Damages assessed by the Enquest, and afterwards the other comes and pleads, and is found Guilty; The Defendant which pleaded last shall be charged with the Damages taxed by the first Inquest; for the Trespass which the Plaintiff had made joynt by his Writ and Count, and done at one time, cannot be severed by the Jurors, if they find the Trespass to be done by all, at one and the same time as the Plaintiff declared.

So

So in the Treſpals againſt divers Defendants, if they plead Not Guilty, or ſeveral Pleas, and the Jury find for the Plaintiff in all, the Jurors cannot aſſeſs ſeveral Damages againſt the Defendants, becauſe all is but one Treſpals, and made joynt by the Plaintiff by his Writ and Count. And although that one of them was more malicious, and de facto, did more and greater wrong than the others, yet all came to do an unlawful act, and were of one party, ſo that the act of one, is the act of all, of the ſame party being preſent. But in Treſpals againſt two, if the Jurors find one guilty at one time, and the other at another time, there ſeveral Damages may be tared. But if the Plaintiff bring an Action of Treſpals againſt two, and declare upon a ſeveral Treſpals, his Action ſhall abate. And this is the diverſity between the finding of the Jury, and the confeſſion of the party. Several Damages. Vide Devant cap. 4.

And in Treſpals, where the Defendants plead ſeveral Pleas, all tryable by one Jury, and they find generally for the Plaintiff, the Jurors cannot ſever the Damages; if they do, their Verdict is vicious.

If the Declaration be of ſeveral Damages, touching every part in ſeveral, the Verdict ought to find the Damage ſeveral, as the Declaration is. Detinue.

So in Waſte, for every ſeveral parcel. Waſte.

So in a Præmunire, againſt the principal and acceſſary. Præmuuire.

Forcible Entry. So in a forcible Entry, where some are found to detain forcibly, and others to enter forcibly.

Treſpaſs. If one be found guilty of ſeveral treſpaſſes, the Damages may be entire.

Jeofail. If one of the Iſſues be a Jeofail, and the Damages intirely aſſeſſed, 'tis ill in both.

Coſt. But Coſt in theſe Cales muſt be intire.

Judgment. *de melioribus dampnis.* But in Treſpaſs againſt two, where one appears and pleads not Guilty to a Declaration againſt him, with a ſimul cum, &c. and afterwards the other appears and pleads not Guilty to a Declaration againſt him alſo with a ſimul cum, &c. Whereupon two Venire fac. iſſue out, and one Iſſue tryed after the other, and ſeveral Damages aſſeſſed: in Judgment of the Law, the ſeveral Juries give one Verdict, all at one time, and the Plaintiff hath his Election to have judgment de melioribus dampnis, by any of the Inqueſts. And this ſhall bind all, but fiat niſi una Executio.

Damages. It is a Maxim, That in every Caſe where an Inqueſt is taken by the Miſe of the parties, by the ſame Inqueſt ſhall Damages be taxed for all. And in Mich. 39 H. 6. f. 1. In an Action of Treſpaſs againſt many, (who pleaded in Bar the Term before) and one of them made default, which was Recorded: Writ of Inquiry. There it is reſolved by all the Court, That for ſaving of a Diſcontinuance, a Writ of Inquiry of Damages ſhall be awarded; but none ſhall iſſue out, becauſe he ſhall be contributory to the Damages taxed by the Inqueſt,

queſt, at the Miſe of the parties, if it be found for the Plaintiff: and if it be found againſt the Plaintiff, then the Writ of Enquiry ſhall iſſue forth.

And the reaſon wherefore no Writ ſhall iſſue out at firſt, to enquire of Damages, until, &c. is, becauſe that if a Writ ſhould iſſue out, and be executed, this is nothing but an Inqueſt of Office, and not at the Miſe of the parties, and yet this Inquiry (if it might be allowed) ought to ſerve for all the Damages; for inquiry of Damages ſhall not be twice, and the others which have pleaded to Inqueſts of the Iſſue be found againſt them, ſhall be chargable to thoſe Damages which are found by the Inqueſt of Office, and if they be exceſſive they ſhall have no remedy, although there be no default in them: for they cannot have an Attaint, becauſe it is but an Inqueſt of Office.

So in Treſpaſs or aſſumpſit againſt two, if one confeſs the Action, or let it go by nil dic. and the other plead, the Jury upon the Iſſue ſhall aſſeſs the Damages againſt both. Keeble 1 part, 623.

But in Treſpaſs againſt two, who plead Not Guilty, &c. ſeverally; and ſeveral Venire facias awarded, the Inqueſt which firſt paſſes, ſhall aſſeſs Damages for all, and the ſecond Inqueſt ought not to aſſeſs Damages at all, but that the Defendant ſhall be contributory to the Damages aſſeſſed by the firſt Jury, notwithſtanding he is not party to it; yet if theſe Damages be exceſſive, he ſhall have an Attaint,

Damages by the firſt Inqueſt.

(because though he is a stranger to the Issue, yet in Law, he is privy in Charge.) And so no Damage or Mischief can accrue to him in this Case.

Verdict, when to be supplied, by Writ of Inquiry, &c.

Vide hic. cap. 6.

Now let us see when something is left out of the Verdict, which the Jury ought to have inquired of whether it may be supplied by matter ex post facto; and how: And for this, know, That if Damages be left out of a Verdict, this omission cannot be supplied by Writ of Inquiry of Damages: for this would prevent the Defendant of his remedy by Attaint, which would be very mischievous; for then such omission might be on purpose, to deprive the Plaintiff of his Attaint, Lib. 10.119.

And the Rule is, That when the Court ex officio, ought to inquire of any thing, upon which no Attaint lies, there the omission of this, may be supplied by a Writ of Inquiry of Damages: as in a Quare Impedit, if the Jury omit to enquire of these four things, that is to say, de plenitudine, ex cujus præsentatione, si tempus semestre transierit, and the value of the Church per annum, there the Plaintiff may have a Writ to inquire of these points. Dyer 241. 260. because of these no Attaint lies, as it is holden in 11 H. 4. 80. because that as to these, the Inquest is but of Office. But in all Cases, where any point is omitted, whereof no Attaint lyeth, there this shall not be supplyed by Writ of Inquiry, upon which no Attaint lyeth. And therefore in Detinue, if the Jury find Damages and Cost, and no Value as they ought, this shall

Keeble 1 part, 882.

not

not be ſupplied by Writ of Inquiry of Damages, for the reaſon aforeſaid. Ib. Et ſic in ſimilibus.

The Plaintiff was Non-ſuit. And upon the Statute 17 Car. 2. 7. the Jury inquired of the value of the Cattel, ſcil. 55 l. and da. 12 d. But they did not inquire what Rent was arrear: and it was moved to ſupply it by a new Writ of Inquiry, as in a Quare Impedit; but 'twas anſwered, that the Statute ſays, in caſe of a Non-ſuit, The ſame Jury ſhall enquire of the value of the Cattle, and the Rent Arrear. Siderfin 480. Keeble 2 part, 409. In Replevin.

A Verdict upon an Iſſue of miſnomer, pleaded in abatement, is peremptory, and if the Jury omit to find Coſts, they cannot be ſupplied by a Writ of Inquiry &c. Keeble 2 part, 545. Abatement. Coſts.

But how then? What, ſhall the Plaintiff loſe the benefit of his Verdict, becauſe the Jury aſſeſſed no Damages (or did inſufficiently aſſeſs them?) Certes in ſuch Caſes where Damages only are to be recovered, he muſt loſe the whole benefit of his Verdict; but where any thing elſe is to be recovered, beſides Damages, as in Debt, Ejectment, &c. he may releaſe his Damages, and have Judgment upon his Verdict as to the reſt. And ſo where Damages are to be recovered, if part of them are aſſeſſed inſufficiently, and part well, he may have Judgment for thoſe Damages well aſſeſſed. And oftentimes the inſufficience of the Declaration ſtall ſet aſide the Verdict; as if in an Action upon the Caſe be brought upon two Verdict ſet aſide, becauſe the damages not well aſſeſſed. Releaſe Damages. Carters Rep, 51. Verdict ſet aſide in part, for inſufficiency in the Declaration.

pro-

promiſes, and one of them be inſufficiently laid, and the Verdict give intire damages, this is naught for the whole; but if the damages had been ſeverally aſſeſſed upon the ſeveral promiſes, then the Verdict as to the promiſe well laid, ſhould have ſtood. Lit. Rep. 61. 2 Keb. 488.

Releaſe of Damages where none were aſſeſſed.

In the 11th Report, f. 56. Marſh brought a Writ of Annuity againſt Bentham, and the Parties deſcended to Iſſue, which was tryed for the Plaintiff, and the Arrearages found, &c. But the Jurors did not aſſeſs any Damages or Coſt; which Verdict was inſufficient, and could not be ſupplyed by Writ of Inquiry of Damages: wherefore the Plaintiff releaſed his Damages and Coſts, and upon this had Judgment: upon which the Defendant brought a Writ of Error, and aſſigned the Error aforeſaid, ſcil. the inſufficiency of the Verdict, ſed Judicium affirmatur, becauſe the Plaintiff had releaſed his Damages and Coſts, which is for the benefit of the Defendant.

In Detinue of Charters, or non detinet, Verdict for the Plaintiff and Damages, but the Jury did not find the value of the Deeds, and a Writ of Inquiry was awarded to that purpoſe and returned, and ruled good; and by Twiſden Juſtice, Debt againſt Executor, who pleads plene, &c. And it is found againſt him, and the Jury give no Damages, that can't be aided by Writ of Inquiry. Burton verſus Robinſon, Paſch. 17 Car. 2. B. R.

In

In Dyer 22 Eliz. 369, 370. In a Writ of Ejectione Cuſtodiæ terræ & hæredis, the Jurors aſſeſſed Damages intirely, which was inſufficient; for it lay not for the Heir, yet the Plaintiff releaſed his Damages, and had Judgment for the Lands And Note, That inſufficient aſſeſſment of Damages, and no aſſeſſing is all one. Releaſe of Damages where they were not well aſſeſſed.

The Jury ought to aſſeſs no more Damages pro injuria illata, than the Plaintiff declares for; but they may aſſeſs ſo much, and moreover give Coſts, which is called Expenſæ litis; though in the proper and general ſignification Dampnum alſo comprehends Coſts of Suit, as the Entry reciting both Damages and Coſts, well affirms, ſcil. Quæ dampna in totos ſe attingunt cum, &c. Damages and Coſts.

But if the Jury do aſſeſs more Damages than the Plaintiff declares for, the Plaintiff may remit the over-plus, and pray Judgment for the reſidue, as in the 10th Report, f. 115. In Treſpaſs the Plaintiff declared ad dampnum, &c. 40 l. at the Tryal the Jury aſſeſſed Damages occaſione tranſgreſſionis prædict. ad 49 l. And for Coſts of Suit 20 s. Upon which Verdict the Plaintiff at the day in Bank, remitted 9 l. parcel of the ſaid 49 l. aſſeſſed for Damages, and prayed Judgment for 40 l. (to which Damage he had counted) with increaſe of Coſts of Suit. and had 9 l. de Incremento, added by the Court, which in all amounted to 50 l. and had his Judgment accordingly: upon which a Writ of Error was brought, and the Judgment affirmed. More Damages than the Plaintiff declares for. Damages remitted.

For

For as in real Actions, the Demandant shall not count to Damages, &c. because it is incertain to what sum the Damages will amount, by reason he is to recover Damages pendant le Brief; so in the case of Costs, he shall recover for the Expences depending the Suit, which being uncertain, cannot be comprehended in the Count, because the Count extends to Damages past, and not to Expences of Suit. For in personal Actions he counts to Damages, because he shall recover Damages only for the wrong done, before the Writ brought, and shall not recover Damages for any thing, pendant le Brief. But in real Actions, the Demandant never counts to Damages, because he is to recover Damages also, pendant le Brief, which are incertain.

Damages in real and personal Actions.

The Jury may if they will, assess the Damages and Costs intirely together, without making any distinction. 18 E. 4. 23. But then they must not assess more Damages and Costs than the Damages are which the Plaintiff counts to, for if they do, the Plaintiff shall recover only so much as he hath declared for, without any increase of Cost, because the Court cannot distinguish how much they intended for Cost, and how much for Damage.

Damages and Costs intirely assessed.

As in 13 H. 7. 16, 17. One Darrel brought a Writ of Trespass, and counted to his damage twenty Marks, the Defendant pleaded Not Guilty, and the Jury taxed the damages and costs of Suit jointly to twenty two Marks, and the Verdict was held to be good for twenty Marks, and void for the re-

reſidue, becauſe it doth not appear how much was intended for damages, and how much for coſts, ſo that there may be more damages than the Plaintiff declared for, or leſs, and ſo the Court knows not how to increaſe the coſt; Wherefore he ſhall have Judgment but for twenty Marks, by reaſon of the incertainty.

Where a ſpecial Verdict is not entred according to the Notes, the Record may be amended and made agree with the Notes at any time, though it be three or four, &c. Terms after it is entred, Lib. 4. 52. Lib. 8. 162. Cro. 1 part, 145. Verdict amended by the Notes.

In the Caſe of Turnor and Thalgate, Mich. 1658. B. R. It was ſaid per Curiam, That ſpecial Verdicts may be amended by the Notes, but the Notes cannot be amended or inlarged by any Averment or Affidavit, for that were to find a Verdict by the Court. Yet in that Caſe, where the Notes were, That the Judgment, &c. was vacated prout per Rule, the Verdict was amended, vacated per Curiam prout per Rule; for ſo is implied in the Notes. Notes. See Keeble 1 part, 504, 907.

See a Verdict amended by the Notes after Judgment and Error brought. 1 Roll. Rep. 82.

If the matter and ſubſtance of the Iſſue be found, it is ſufficient, for preciſe forms are not required by Law in ſpecial Verdicts, (which are the finding of Lay Men) as in Pleadings which are made by Men learned in the Law, and therefore intendment in many caſes ſhall help a ſpecial Verdict, as much as a Teſtament, Arbitrement, &c. Form. Hob. 54.

And

And therefore he which makes a Deputy, ought to do it by Escript; but when the Jury find generally, that A. was Deputy to B. all necessary incidents are found by this; and upon the matter they find, that he was made Deputy by Deed, because it doth tantamount. Lib. 9. 51. And in the 5th Report, Goodal's Case, It was resolved, That all matters in a special Verdict, shall be intended, and supplied, but only that which the Jury refer to the consideration of the Court.

Ill conclusion.

In all Cases where the Jury find the matter committed to their charge at large, and over more conclude against Law, the Verdict is good and the conclusion ill. Lib. 4. 42. And the Judges of the Law will give Judgment upon the special matter according to the Law, without having regard to the conclusion of the Jury, who ought not to take upon them Judgment of the Law. Lib. 10. 11. Vide hic 400.

More 105, 269.
Litt. Rep. 135, 94, 106.

As general as the Nar.

Where the Declaration in Trespass is, Cum aliquibus averiis, of a number uncertain, and the Verdict is as general as the Declaration, Cum aliquibus averiis, there the Verdict is good, Cro. 2 part, 662.

In Ejectione firmæ, where the Plaintiff declared of a Messuage and three hundred Acres of Pasture in D. per nomina, of the Manor of Monkhal, and five Closes per nomina, &c. Upon Not Guilty, the Jury gave a special Verdict, viz. quoad four Closes of Pasture, containing by estimation two thousand Acres of Pasture, that the Defendant was Not Guilty, Quoad residuum; they

they found matter in Law: And it was moved by Yelverton, That this Verdict was imperfect in all: For when the Jury find that the Defendant was not guilty of four Cloles of Pasture, containing by estimation two thousand Acres of Pasture, it is incertain, and doth not appear of how much they acquit him. And then, when they find Quoad residuum, the special matter, it is uncertain what the residue is, so there cannot be any Judgment given; and of that Opinion was all the Court, wherefore they awarded a Venire facias de novo, to try that Issue, Cro. 2 part, 113.

Quoad residuum, incertain.

Ejectione firmæ of thirty Acres of Land in D. and S. The Defendant was found Guilty of ten Acres, and Quoad residuum Not Guilty; and it was moved in arrest of Judgment, That it is uncertain in which of the Wills this Land lay and therefore no Judgment can be given: sed non allocatur, and it was adjudged for the Plaintiff, for the Sheriff shall take his Information from the Party for what ten Acres the Verdict was. Cro. last part, 465. diversitas apparet.

Quoad residuum.

Where the Jury find Circumstances upon an Evidence given, to incite them to find Fraud, &c. yet the same is not sufficient matter upon which the Court can judge the same to be fraud, &c. Brownlow 2 part, 187. Yet in many Cases the Jury may find Circumstances and Presumptions, upon which the Court ought to judge. As to find that the Husband delivered Goods devised by the Wife. Upon this, the Court adjudged

Circumstances.

More 192. Carters Rep. 16.

ed that the Husband assented to the devise at first.

Postea amended, how.

Where a Verdict is certainly given at the Tryal, and uncertainly returned by the Clerk of the Assises, &c. The Postea may be amended, upon the Judges certifying the truth how the Verdict was given. 1 Cro. 338. See Keb. 2 part 875. Where the Court would not compel the bringing in the Postea, 1 part, 346.

Ill Plea, made good by Ver-Verdict. 2 Keb. 362.

In many Cases a Verdict may make an ill Plea or Issue good. As in an Action for Words, Thou wast Perjured, and hast much to answer for it before God. Exception after Verdict for the Plaintiff, in arrest of Judgment: For that it is not laid in the Declaration, that he spake the Words auditu quamplurimorum, or of any one, according to the usual form: sed non allocatur; for being found by the Verdict that he spake them, it is not material, although he doth not say, in auditu plurimorum; whereupon it was adjudged for the Plaintiff. Cro. 1 part, 199. So want of a day in the Mar. made good by Verdict. Keble 2 part, 354.

See Cro. last part, 116. Where the Bar was ill, because no place of payment was alledged, yet the payment being found by Verdict, it was adjudged well enough; for a payment in one place, is a payment in all places. Keble 1 part, 662, 771, 786, 793. Sidertin 306, 290, 341, 342, 379. Littletons Rep. 184, 200, &c. Modern Rep. 42, 43. Hardres Rep. 42, 43.

An

In an Action of the Case, for continuance of a Wall, by which the Plaintiffs Lights were stopped, in an ancient House. Per Cur. The Plaintiff ought to shew the Wall was new, and is not helped by Verdict. Keeble 1 part, 584.

Not Guilty is a good Plea after Verdict in assumpsit, so on non assumpsit the Jury may find the Defendant Guilty Keeble 1 part, 795.

In an Action sur assumpsit, laid twenty years since, & non cul. infra sex annos, & replic. infra sex annos, which is a departure, yet the Verdict helps it. Keeble 1 part, 566.

In pleading riens avoit Jour del brief, and said not ne unque puis, and the Jury find it, it is helped by the Verdict.

But Drake said, the same after Verdict was helped by the Statute of Jeofails.

The like 22 E. 4. 46. Que le Baron ne fuit seisie que Dower Jour del Espousal, &c.

So if an Executor plead Riens enter mains jour del brief, &c. and omit ne unque puis. 5 H. 7 14.

Debt brought upon a Bond against an Heir in the Detinet, only, and upon riens per discent there was a Verdict for the Plaintiff, 'tis naught upon a Demurrer, but after Verdict is aided by the Statute 16 and 17 Car. 2. cap. 8. Which is (after several matters of substance) thereby Enacted to be amended after Verdict, and other matters of like nature, not being against the right of the matter in Suit, &c. shall not stay Judgment, Syderfin 342. Keeble 2 part, 259, 278, 309, 470. 1 part, 662, 771. Debt *versus* Heir.

An Indictment of Extortion against a Bayliff, quod colore officij extorsive & injuriose, he took Money, and sheweth not the particulars; good per curiam, especially after Verdict. Keeble 1 part, 357.

Way

In Information for not repairing a High Way in their Parish. Upon Non debent reparare, the Verdict found so, for the Defendant. The Court held the Issue ill, because 'tis contrary to Law, the Way being in their own Parish, they ought to have shewed who ought to repair, and if the Verdict had found that the Defendant ought to repair, it had been well enough, however after Verdict the Court gave Judgment, that the Defendant should be acquitted.

A repleader was denied. Keeble 1 part, 498, 829.

Trespass by Baron and Feme, de clauso fracto, of the Barons, and for the battery of the Feme, ad dampnum ipsorum. The Defendant, Quoad the clausum fregit, pleaded Not Guilty, Quoad the Battery justifies. And for the first Issue, it was found for the Defendant; and for the second, for the Plaintiff, and now moved in Arrest of Judgment that the Declaration is not good, because the Baron joyns the Feme with him in Trespass de clauso fracto of the Barons, which ought not to be; but for the Battery of the Feme, they may joyn, whereto all the Court agreed; but it was moved, That in regard it was found against the Plaintiffs for this Issue, in which they ought not to joyn, and the Defendant is thereof acquitted, and the Issue is found against the Defendant, for that part wherein they ought to joyn: This Verdict has discharged the Declaration for

Baron and Feme: *Vide* Keeble 1 part, 944.

Count against Baron and Feme, of Trespass done, *cum averijs suis*, after Verdict. allowed good. 946.

that

that part which is ill, and is good for the residue. As in 9 E. 4. 51. Trespass by Baron and Feme, for the Battery of both: The Defendant pleaded Not Guilty, and found Guilty, and Damages assessed for the battery of the Baron, by it self, and for the battery of the Feme, by it self, and Judgment was given for the Damages for the battery of the Feme, and the Writ abated for the residue. (And of that Opinion was Lee, Chief Justice, and Dodridge al contra.) And the same Law I conceive, if the Jury had found the Defendant Not Guilty of the battery to the Husband, but Guilty to the Wife. Cro. 2 part, 655. Palmers Rep. 338.

Rochel and his Wife brought an Action of Trespass and Assault in the Exchequer, Hill. 1659. against Steel and others, who pleaded Not Guilty, and the Verdict found Steel guilty of battery to the Wife, but found nothing concerning the Husband; wherefore Judgment was stayed; but the Barons held, That if the Jury had found the Defendant Not Guilty, as to the Husband, then the Verdict had helped the Declaration, and the Plaintiff should have had Judgment for the damages for the battery of the Wife. *Rochel* and his Wife against *Steel.*

Horton and his Wife declared in Trespass for beating the Wife, ad dampnum ipsorum, and good. Syderfin 387.

The Jury may find any thing that may be given in Evidence to them, as Records, either Patent, Statute, or Judgment. Things done in another County or Country; for which see Evidence before. Hob. 227. And of those things they ought to Of what a Verdict may be. Plo. Com. 414.

Incidents. have Conuſance, they are to have Conuſance alſo, of all incidents and dependants thereupon; for an Incident is a thing neceſſarily depending upon another. Co. Lit. 227. b.

How conſtrued. If the Verdict may any ways be conſtrued good, a conſtruction to deſtroy it ought not to be made. Carter's Rep. 80, 94.

Outlaw. If one of the Jury be Outlawed when the Verdict is found, the Verdict is not good, but may be reverſed by Error.

In a ſpecial Verdict, the Caſe in Fact muſt be found clear to a Common intent, without Equivocation. Vaughan's Rep. 78.

Contents of a Deed. If the Jury collect the Contents of a deed, and alſo find the deed in hæc verba, the Court is not to judge upon their Collection, but upon the deed it ſelf. The Jury may find the Contents of a deed or Will proved by Witneſſes. Ib.

Common. Treſpaſs for diſturbing him of his Common belonging to an hundred Acres, and the Jury find Common for fifty, this is for the Plaintiff; otherwiſe upon an Avowry, or *Vide apres* 403. Quod permittat, which are founded upon the right, but the Treſpaſs is for Damages. Palmers Rep. 289.

The Verdict may be againſt the Letter of the Iſſue, ſo the ſubſtance is found. If the matter and ſubſtance of the Iſſue be found it is ſufficient, though it be againſt the Letter of the Iſſue. As in the firſt Inſtitutes, f. 114. b. A Modus decimandi was alledged by Preſcription time out of mind, for Tythes of Lambs, and thereupon Iſſue joyned. And the Jury found, that before twenty years then laſt paſt, there was ſuch a Preſcription, and that for theſe twenty years, he had paid Tythe Lamb in

Preſcription. ſpecie,

ſpecie. And it was obſerved firſt, That the Iſſue was found againſt the Plaintiff, for that the Preſcription was generall for all the time of the Preſcription, and twenty years fall thereof. Secondly, That the party by payment of Tythes in ſpecie, had waved the Preſcription or Cuſtom. But it was adjudged for the Plaintiff, for albeit the Modus decimandi had not been paid by the ſpace of twenty years, yet the Preſcription being found, the ſubſtance of the Iſſue is found for the Plaintiff.

In an Aſſiſe of Darrein preſentment, if the Plaintiff alledge the avoydance of the Church by priviation, and the Jury find the voydance by death, the Plaintiff ſhall have Judgment; for the manner of voydance is not the title of the Plaintiff, but the voydance is the matter. 1 Inſt. 282. Avoydance.

If a Gardian of an Hoſpital bring an Aſſiſe againſt the Ordinary, he pleadeth that in his Viſitation he deprived him as Ordinary, whereupon Iſſue is taken, and it is found that he deprived him as Patron, the Ordinary ſhall have Judgment, for the deprivation is the ſubſtance of the matter. Ib. Deprivation.

The Leſſee Covenants with the Leſſor not to cut down any Trees, &c. and binds himſelf in a Bond of forty pounds for the performance of Covenants. The Leſſee cut down ten Trees, the Leſſor bringeth an Action of Debt upon the Bond, and aſſigneth a breach, That the Leſſee cut down twenty Trees, whereupon Iſſue is joyned, and the Jury find that the Leſſee cut down ten: Judgment ſhall be given for the Plaintiff, Breach of 20 Trees cut down for 10.

for ſufficient matter of Iſſue is found for the Plaintiff to forfeit the Bond. Ib.

And this Rule holds in Criminal Caſes; For if A. be appealed, or indicted of Murder, viz. that he of malice prepenſed killed J. A pleadeth that he is Not guilty, Modo & forma, yet the Jury may find the Defendant Guilty of Manſlaughter without malice prepenſed, becauſe the killing of J. is the matter, and malice prepenſed is but a Circumſtance. Plo. Com. 101.

Indictment of Murder, and Verdict finds Manſlaughter. Siderfin 325.

Modo & forma.

And generally where modo & forma, are not of the ſubſtance of the Iſſue, but words of Form, there it ſufficeth, though the Verdict doth not find the preciſe Iſſue.

As if a Man bring a Writ of Entry in caſu proviſo, of the Alienation made by the Tenant in Dower to his diſinheritance, and counteth of the Alienation made in Fee, and the Tenant ſaith, That he did not Alien in manner as the Demandant hath declared, and upon this they are at Iſſue, and it is found by Verdict, that the Tenant alienes in Tail, or for term of another Mans Life. The Demandant ſhall recover, yet the Alienation was not in manner as the Demandant hath declared. Littleton, Sect. 483.

Alienation.

Alſo if there be Lord and Tenant, and the Tenant hold of the Lord by Fealty only, and the Lord diſtrain the Tenant for Rent, and the Tenant bringeth a Writ of Treſpas againſt his Lord, for his Cattel ſo taken, and the Lord plead that the Tenant holds of him by Fealty and certain Rent, and for that Rent behind he came to

Treſpas by the Tenant againſt the Lord.

distrain, &c. And demand Judgment of and Writ brought against him, Quare vi & armis, &c. And the other saith that he doth not hold of him in manner as he supposed; and upon this they are at Issue. And it is found by Verdict, that he holdeth of him by Fealty only, in this case the Writ shall abate, and yet he doth not hold of him, in manner as the Lord hath said; for the matter of the Issue is, Whether the Tenant holdeth of him or no; for if he holdeth of him, although that the Lord distrain the Tenant for other services which he ought not to have, yet such Writ of Trespass, Quare vi & armis, &c. doth not lye against the Lord, but shall abate. Littleton Sect. 485.

Also in a Writ of Trespass for Battery, or for Goods carryed away, if the Defendant plead not Guilty in manner as the Plaintiff supposeth, and it is found that the Defendant is Guilty in another Town, or at another day, than the Plaintiff suppose, yet he shall recover. The Verdict may find the Defendant guilty of the Trespass at another day or place.

So the Jury may find the Conspiracy at another day, for the day is but form. Conspiracy.

In Battery, if the Defendant justifie at another day with a Traverse, Devant & apres he may be found Guilty at another day. Battery.

If the Defendant by his Plea agree with the Plaintiff in the day, year and place, and the Plaintiff reply, de son tort demesn sans tiel cause, and the Defendant prove an Assault by the Plaintiff, the Plaintiff shall not give in Evidence a Battery at another day. Rolls tit. Tryal 687. Vide devant cap. 11. *Son assault demesn.*

And ſo in many other Caſes theſe words, ſcil. in manner as the Demandant or the Plaintiff hath ſuppoſed, do not make any matter of ſubſtance of the Iſſue. Littleton Sect. 485.

Modo & forma when words of form Siderfin 357.

And 'tis a Rule, That where the Iſſue taken goeth to the point of the Writ or Action, there Modo & forma are but words of form, as in the caſes aforeſaid.

When of ſubſtance, and muſt be found by the Verdict.

But when a Collateral point in pleading is traverſed, as if a Feoffment be alledged by two, and this is traverſed Modo & forma and it is found the Feoffment of one, there Modo & forma is material: ſo if a Feoffment be pleaded by deed, and it is traverſed Abſque hoc quod feoffavit modo & forma upon this Collateral Iſſue, Modo & forma are ſo eſſential, as the Jury cannot find a Feoffment without Deed. Co. Littleton, 282.

So in *non aſſumpſit modo & forma*, upon an *Indebitatus aſſumpſit*, there *modo & forma*, were not material. *Secus*, when the Action is upon a Collateral promiſe.

Treſpaſs *Quare vi & armis*, lies not againſt the Lord for diſtraining his Tenant, without cauſe.

But here is a diverſity to be obſerved, That albeit the Iſſue be upon a Collateral point, yet if by the finding of part of the Iſſue, it ſhall appear to the Court, that no ſuch Action lyeth for the Plaintiff, no more than if the whole had been found, there Modo & forma, are but words of form, as in there aforeſaid Caſe of the Lord and Tenant, it plainly appears; for it was all one, whether the Tenant held by Fealty only, or by Fealty and Rent, becauſe if either was true, the Tenant could have no Treſpaſs, Quare vi & armis, againſt the Lord in that Caſe,

Case, by the Statute of Marlbridge. Cap. 3. Vide hic devant.

After the Verdict recorded the Jury cannot vary from it, but before it is recorded they may vary from the first offer of their Verdict. And that Verdict which is recorded shall stand. 1 Inst. 227. Plo. Com. 212.

Jury cannot vary from their Verdict when it is recorded.

There is also a Verdict given in open Court, and a privy Verdict given out of Court, before any of the Judges of the Court, so called, because it ought to be kept secret and privy from each of the Parties, before it be affirmed in Court.

Open Verdict and privy Verdict.

Because the Jury may vary from their private Verdict, as if that find for the Plaintiff, the open Verdict may be for the Defendant, and this shall stand, and the private Verdict shall not be deemed a Verdict; for the Jury are charged openly in Court, and in Court their Verdict ought to be received, and this which they pronounce openly in Court shall be adjudged their Verdict.

The Jury may vary from a private Verdict.

And although it is usual to take the Verdict secretly, when the Jurors are agreed, yet this is not of necessity of Law, but of courtesie of Law for the ease of the Jurors, and in this case, their saying shall not be their Verdict till it is openly pronounced in the Court; for when they come in the Court, the Plaintiff shall be demanded, and then may be non-suited: but when they give their Verdict secretly the Plaintiff is not demandable, nor can be then non-suited, but he may be non-suited, when the Verdict of right ought to be rendred. Ergo, the force is in the giving of the Verdict in the Court, and not elsewhere.

And

Bro. tit. Verdict 12.

And also in the Court it self, if they pronounce their Verdict, they may change it, if they be mistaken, or if it be not right in Law, or for some other reasonable cause immediately perceived. Wherefore if they may vary and contradict their first Verdict given in open Court, a fortiori upon better advisement they may do so when their first Verdict was given out of Court, and they not discharged; for they be in the Custody of the Bailly, till they be discharged in Court. Plo. Com. 211. More 33.

Jury shall give but one Verdict in the same Cause.

The Jury having once given their Verdict, although it be imperfect, shall never be sworn again upon the same Issue (unless it be in case of Attile, when the Party is to recover by view of the Jurors.) But there must be a Venire facias de novo. Cro. 2 part, 210.

Verdict good in part.

If a Verdict be good in part, and naught in another part, it shall stand in part, and a new Inquest shall be for the rest. Bro. tit. Verdict 89.

What permitted in Pleading for the Juries direction in their Verdict.

For the Juries direction in their Verdict, greater liberty is permitted in pleading a matter doubtful in Law; for, a Traverse (for this reason) may be omitted. As in Debt against an Executor, it is a good Plea to say, Administration was committed to him, and therefore he should be named Administrator, and not Executor, without traversing that he is not Executor; for the Lay-People know no difference, between one administring as Executor, and one administring as Administrator. 9 E. 4. 33.

For

For this Reason likewise the Special matter may be pleaded together with the generall Issue, &c. As that the Obligation put in Suit was sealed by him, and delibered to A. to keep till certain Inventures were made between the Plaintiff and him, before which Inventures made, the Plaintiff took the Obligation out of the possession of A. So is not his Deed. This is good, and yet by this generall conclusion, the matter precedent shall not be waved, for it were perilous to put the Special matter in the Mouth of Lay-People, 9 H. 6. 38.

A special *Non est factum.*

Damages in Trespass, if a Release be pleaded in a Forreign County, and tryed there for the Plaintiff, there also shall Damages be assessed by the same Jury. For where the principal is tryed, there also shall the Accessary and Incidents be enquired of. I need use no other Instances to illustrate this, than the Case abovesaid.

Where the Issue upon a collateral matter is tryed in a foreign County, Hundred, &c. where the Principal and Accessary shall be tryed. 21 Ass. 14.

They may find a Condition to defeat a Freehold of Land, although it be not pleaded; but of things in Grant, they must also find the Deed of the Condition.

What things the Jury must find.

Upon Traverse of a Lease *Modo & forma* the Jury may find a Lease of another date, although the date be mistaken in the Pleading, but not a Lease made by another, than from whom was pleaded; for this is out of the Issue in matter and form.

Modo & forma.

In an Assise of Rent, the Jury may find that the Rent was granted with an Attornment, although no specialty be shewed.

Rent.

Matter of Record. A Fine or Recovery may be found by the Jury, without shewing of it under Seal. The Jury cannot find against what is admitted by the Record. Siderfin 271.

Record. If the Verdict be contrary to a matter of Record, it may be set aside as naught.

Inspection. If a party be found by inspection to be within Age, the Verdict that finds him of Age shall be holden for none.

Jeofail: A Verdict finding matter against the Record is a Jeofail. 11 H. 6. 42.

Divorce. They may find a Divorce, which is a Record in the Spiritual Court, but not by our Law.

Attainder. The Verdict found an Attainder of Felony not pleaded, nor given in Evidence Sub pede Sigilli, 26 Ass. 2. And the Court took it ill.

So if a Fine and Recovery where found not pleaded, nor given in Evidence sub pede sigilli. 26 Ass. 5.

The Jury is not to inquire of this which is agreed by the Parties.

Dower. As in Dower, if the Tenant says he has been always ready to render Dower, and the Issue be if the Husband dyed seised, the Jury is not to enquire if the Estate was dowable, for this is confessed.

Wast. If the Defendant doth not deny the Waste, but pleads another matter, scilicet, nul tiel vill lou, &c. The Jury is not to inquire of the Wast, but give damages although no Waste be made.

Award. In debt upon a Bond, with a Condition to perform an Award, and the Defendant plead Nullum fecit Arbitrium, and the Plaintiff

tiff reply, fecit Arbitrium, and ſets it forth, and the Defendant rejoin Nul tiel award, the Jury cannot find any matter dehors to make the Award void in Law, which doth not appear within the Award pleaded; As that the Releaſe awarded would diſcharge the Bond of the Submiſſion, for nothing is in Iſſue, but whether ſuch an Award was made in fait, as is alledged, neither could this matter be alledged by any Rejoynder; for it would have been a departure from the Plea, and a Jury cannot find that which would have been a departure, becauſe out of their Iſſue. But in this Caſe, if the Defendant would have took advantage of it, he ought to have pleaded all this matter in his Barr, and not have ſaid Nullum fecit Arbitrium; for 'tis a departure in the Rejoynder to acknowledge an Award which was denied in the Plea.

In debt for twenty ſhillings, and the Iſſue be, ſolvit ad diem, and the Verdict be Quod debet the twenty ſhillings, this is not good, becauſe it is not direct but by Argument. How the Jury ought to find their Verdict, and what ſhall be intended.

In debt upon an Obligation, if the Defendant ſay, That he is a Lay-Man, not lettered, and 'twas read as an Acquittance, Et iſſint nient ſon fait, if the Jury find he knew what he did, and that it was a Bond, and he was willing to be bound, this is no good Verdict, becauſe they ought preciſely to find if it was his Deed or not. *Nient* lettered.

If

If the Issue be, whether where a Copy-hold is granted to thee for the Lives of two, if he which die seised, &c. ought by Custom to pay an Heriot or not, and the Jury find that there was never any such Estate granted in the Manor, this is not good for the Reasons aforesaid.

Custom.

So if the Issue be, if by Custom an Estate tail may be granted, and the Jury find that it may be granted in Fee; which is greater, yet 'tis not good.

In Tresspas for taking and cutting his Leather; if the Defendant justifie as a Searcher; and cut it for the better Search More Scrutatorum, without any other damage; and the Plaintiff reply, De injuria sua propria absque hoc, that he cut it More Scrutatorum, upon which Traverse Issue is joyned; and the Jury find that the Defendant cut it as the Plaintiff has alledged; this is no good Verdict, because 'tis not any Answer to the Issue but by Argument.

Tresspas.

In Tresspas and Battery in A. to find Not Guilty in A. is not good; for it ought to be generally Not Guilty.

Battery.

Upon this Plea, if the Plaintiff reply, That he hath divers Lands in D. per descent, and the Jury find he had divers Lands by descent, this is good, without finding what; for 'tis not material, in regard upon this false Plea a general Judgment, is to be without having respect to the Assets.

Riens per descent.

Incertain.

Of five Acres, if they find the Defendant guilty in eight pieces, de terræ parcel' tenementorum prædict', 'tis a void Verdict becaus uncertain, and no Execution can be made of pieces. Ejectment.

In Ejectment of a Mannor, an Non culp. The Verdict was for the Plaintiff for the Mannor, and Quoad servicia non culp. 'Twas objected that the Verdict was not for the Plaintiff for the Mannor, because as to the Services 'was for the Defendant; but 'twas answered the last part as to the Services was void, and surplusage. Siderfin 232. Keble 1 part, 840. Mannor.

In Case upon Non Assumpsit pleaded, if the Jury find that the Defendant Non Assumpsit; yet if two Witnesses say true, then the find that he did assume. The first shall stand for the Defendant, and the last words are void; and surplusage shall not vitiate. Verdict special. Surplusage.

If upon a Lease of twenty Acres and the Jury finds Quod dimisit ten Acres tantum, and the conclusion of the Verdict is, Et si, super totam materiam Curiæ videbitur quod Defendens dimisit twenty Acres, then they find for the Plaintiff; and if not, then for the Defendant, this is repugnant, and so the Verdict is void in all. Ejectment.

In Ejectione firmæ de 7 Messuagiis sive Tenementis, and Verdict pro Querente. 'Tis ill for the incertainty, and the Verdict doth not help it; and Hale refused to let the Jury find for the Plaintiff, for the Messuages, and Non Culp. for the Tenements: but by Twisden, if it had been de uno Messuagio sive tenemento vocato, the Black Swan, it had been

been good, because the last part makes it certain. Siderfin 295. Keble 2 part, 80. Cro. 3 part, 186.

Certain. To assess Damages uncertainly is void; as to say we assess forty pounds, if we must by Law, if not then but three pounds, this is void.

Damages. Indebitatus assumpsit, to assess damages occasione debiti prædicti is good, although it ought to be occasione non performationis, &c.

Information. In an Information upon the Statute 39 Eliz. cap. 14. for lying with Logwood, by which he lost twenty pounds for every Offence; upon Not Guilty, if the Jury find him Guilty for using this against the Statute for forty days, by which he lost this is not good, because he forfeits twenty pounds for every time, and the number of times do not appear.

If the Jury find the words in the Will, and yet do not find the Will, the Verdict is not good.

If they first find the special matter, and then find the Issue generally, the special matter is hereby waved.

Where a Special Verdict shall be good by intendment. If the Jury find that J. S. was seised in Fee, and devised the Land to J. D. although they do not find that the Land was held in Socage, yet this is good; for this shall be intended, this being a collateral thing, and this being the most common Tenure.

Devastavit. Verdict of Eloynment and Conversion to his own use, proves a Devastavit, Keble 2 part, 488.

If

If they find that he was seised and made his Will in hæc verba, &c. although they do not find that he Devised the Land as in the former; yet this is good by intendment. Will.

But if a thing is life out, and cannot be intended, the Verdict is not good.

If the Issue be whether the Sheriff took J. S. and kept him in Prison in Execution for certain Debt and Damages by force of a Capias ad satisfaciendum, and the Jury find that he took him by force of an Alias Capias ad satisfaciendum, &c. although they do not find that he kept him in Execution for the Debt and Damages aforesaid, according to the Issue; yet this is a good Special Verdict; for it shall be intended; for the Consequence is necessary from this which is found, for he could not take him, but that he must be in Execution. Vide several instances of this. Rolls tit. Tryal, 697. &c.

If the Jury find that J. S. was seised in Fee, and made his Will in hæc verba, and that he afterwards dyed; although they do not find that he dyed seised, yet it shall be intended that he dyed seised, and so good. Will.

If they find that A. did Bargain and Sell, &c. although they do not find any consideration, yet this shall be intended. Bargain and Sale.

So if they find that such Persons Authorizati virtute literarum patentium Dominæ Elizabethæ, &c. and do not find that the Letters Patents were under the Great Seal, yet this shall be intended. Letters Patents.

Intent. Verdicts of Lay-Men shall be taken according to their intent, and need not so precise a form as in Pleadings. Lib. 4. 65. Hob. 76. Siderfin 27, 75. Littletons Reports 133. &c.

Therefore if the Jury find a Recognizance in nature of a Statute Staple in this manner, That the Conusor came before R. O. Recorder of London, and D. O. Mayor of the Staple, Et recognovit se debere to B. 200 l. and do not say, Secundum formam Statuti, &c. nor Preseriptum Obligatorium, &c. although the Statute of 23 H. 8. provide, That it shall be by Bill Obligatory, sealed with three Seals; and here it doth not appear, that there was any Bond or Seal, nor that it was according to the Statute; yet these things shall be intended, they having found a Recognizance before the Mayor and Recorder.

Notes. A special Verdict may be amended by the Notes. Keeble 1 part, 907. See a Coroners Inquisition amended by his Notes.

Where a special Conclusion of a special Verdict shall aid the Imperfections of it. If the Jury find a special Verdict, and refer the Law upon that special Matter to the Court, although they do not find any title for the Defendant, which is a Collateral thing to the point which they refer to the Court, yet the Verdict is good enough, for all other things shall be intended, except this which is referred to the Court. Lib. 5 97. Littletons Rep. 135. &c. Keebles 2 part, 362, 412.

In Ejectment, If the Plaintiff declare upon a Lease made by A. and the Jury find a Special Verdict, and matter in Law upon

a

a power of Revocation of Uses by an Indenture and Limitation of new Uses, and then a Lease for Years made to the Plaintiff by the Lessor in the Declaration, and another, in which there is an apparent variance; but they conclude the Verdict, and refer to the Court, whether the Grant of a new Estate found in the Verdict, by a revocation of the first Indenture, or not. The special conclusion shall aid the Verdict, so that the Court cannot take notice of the variance between the Lease in the Declaration and Verdict, because the doubt touching the Revocation, is only referred to the Court. And although they refer to the Court, whether this be a Revocation of the first Indenture, and not of the former Uses, and Limitation of new Uses, as it ought to be; yet in a Verdict this is good, for their intention appears.

So note a difference between a special Conclusion and Reference to the Court, and a general Conclusion, and Reference to the Court. Vide hic 379.

In Debt for forty shillings for a Horse sole, and the Jury find forty shillings Debt, for two Horses sold; this is found against the Plaintiff, for this is not the same Contract. For whom the Verdict shall be said to be found.

So in Debt, twenty pound, if the Jury find forty pound Debt, this is against the Plaintiff.

In Debt for twenty pound for Wood sold, and the Jury find the Bargain was for twenty marks; the Plaintiff shall not have Judgment for this variance.

So in Debt for Rent upon a Demise of two Acres, and the Jury find it upon the Demise of one Acre, the Plaintiff shall not have Judgment.

But in Debt for twenty four pounds eight shillings, received for the Plaintiffs use, if the Jury find the Defendant ows twenty four pounds, but not the eight shillings, the Plaintiff shall have Judgment: for perhaps he had paid the eight shilling.

In an Action upon the Case against A. if the Plaintiff declares, That by Custom, &c. amongst Merchants, &c. If two are found in Arrearages upon Accompt, and they assume to pay this at certain days, that any one of them may be charged for the whole by himself, and then shews the Accompt of A. and B. who are found in Arrear, in so much, &c. And promised to pay this at certain days, but paid it not, and now he brings his Action against A. although upon Non Assumpsit pleaded, it be found that the days of payment are mistaken, yet the days being past the Action lyes, because the Law makes the duty upon the Accompt; for which after the days an Action lyes.

In Debt upon a Lease of twenty Acres, The Defendant pleaded the Lease was of twenty four Acres, sans ceo que il demise les 20 Acres tantum. The Verdict found the Demise of twenty one Acres only; twas looked upon as a Jeofail and found for neither Plaintiff nor Defendant, Dyer 32.

If the Issue be Assets in Sale, and the Verdict be Assets in Dale, 'tis a good Verdict,

dict, for the place is not material. Keeble 1 part, 662.

So of an Accompt before A. and B. An Accompt found before A. tantum is good.

In Escape of Baron and Feme, and the Jury find of the Baron only, 'tis good, and so in other Actions grounded upon a tort to find part. But upon a Contract the Verdict ought to pursue the Declaration, otherwise in Debt upon a Lease for years, for Rent. Siderfin 5, 6. Keeble 1 part, 371.

Issue whether Pony was paid for Blackacre. Verdict, that it was paid for Blackacre and Whitecare, good: so per Twisden, whether a Common was from Lady-day to Michaelmas, and the Verdict finds from Christmas to Michaelmas day, 'tis good Keeb. 1 p. 192.

Indictment of forcible Entry and Detainer, A Verdict of forcible Entry and forcible Detainer is sufficient to grant Restitution upon. Keeble 1 part, 419.

Barwel prayed Bill of forcible Entry and Detainer, found Ignoramus as to the Detainer, and Billa Vera as to the Entry, might be quash'd, which was done, for the Offence as charged being intire, the Grand Jury cannot apportion their Verdict as the Petit Jury on Indictment may. Keeble 1 part, 931.

Where all is to be given in Damages, the Jury are Chancellors, and may give so much as the Case requires in Equity. Damages.

In Detinue of a Bond of 100 l. if the Jury find that he received a Bond of a greater or less Sum, the Verdict is for the Defendant. Detinue.

Promise. So in a promise to do two things, if the Jury find but one of them, 'tis for the Defendant.

Ejectment. Otherwise in Ejectment upon a Demise of ten Acres, if the Jury find a Demise of less, the Plaintiff shall have Judgment.

Prescription. *Vide* Devant. 385. If the Issue be upon a Prescription for Common belonging to a Messuage and two hundred Acres of Land, fifty of Meadow and fifty of Pasture; if the Jury find Common belonging to the House, twenty Acres of Meadow, and twenty of Pasture in two of the Mills, and not in the rest, the Prescription is not found.

Tresp. Case. If part of the Tresp. or wrong be found 'tis sufficient in Tresp. or an Action of the Case upon a Tort; as by a Commoner, for putting and depasturing Cattel in the Common.

Audita Querela. If the Issue be whether all the Lands in Execution, were the Estate of the Father in Tail, or in Fee, and part is found in Tail, and part in Fee; Judgment shall be given for the Defendant who pleaded the seisin in Fee.

Ejectment. If the Plaintiff declares upon a demise made the first of May, to commence at Michaelmas, next, if the Jury find a Lease made at any other day before the Feast, 'tis found for the Plaintiff; for the day of making is not material.

Otherwise of a Lease for years in Possession; as of a Lease made the fifth of May Habend. for three years from Lady-day before; and the Jury find a Lease made the

15th

15th day of May, for three years, from the same Lady-day; for this is a Lease in Possession.

In false Imprisonment in Middlesex, and the Defendant justifies in London, to which the Plaintiff saith, The Defendant took him in Middlesex, de son Tort demesn, and Issue upon this, and the Jury find the Defendant took him in Middlesex lawfully upon a Writ, yet this is for the Plaintiff; for the Issue is upon the place, and not upon the Tort, for that is confessed by the Pleading, if the taking was in Middlesex. Imprisonment.

In Debt for twenty pound, and the Jury find forty pound, the Plaintiff shall not have Judgment, the reason seems to be because it cannot be the same Debt which is intire; but upon another Contract, which is mislaid. Debt. *Audita Querela* *Vide* 198.

If the Issue be payment after Execution, and the Jury find payment before, yet the Issue is proved; for payment before is payment after.

In Debt upon a Bond, bearing date the 25th of June, upon Non est factum, if the Jury find it his Deed, but that it was delivered eight days after the date, this is found for the Plaintiff. Obligation.

If the Issue be that two made the Feoffment, or two were Church-wardens, &c. and the Jury find but one, &c. the Issue is not found. Joynt and several.

If the breach of Covenant or Wast be assigned in cutting twenty Trees, and the Jury find but ten, yet the Plaintiff shall have Judgment. Obligation. Covenant. Wast.

Totum & Part. If in Replevin, &c. the Jury find that part of the Cattle were Levant and Couchant, and part not, and the Iſſue is upon all, the Iſſue is not found.

In Debt, tam quam, on the Statute 1 Jac. cap. 22. for cutting Oaks unſeaſonably, on not Guilty, and Verdict for the Plaintiff, 'twas excepted in Arreſt of Judgment, That the Jury found the value of each Tree ſix ſhillings eight pence, but do not caſt up the ſum. Sed per curiam in this Iſſue 'tis needleſs; but had the Iſſue been nil debet, they muſt caſt it up, and not leave it to the Court, Keeble 1 part, 835.

Indictment. Keeling excepted to an Indictment of Aſſault, Battery and Wounding. The Jury find him Not Guilty de tranſgreſ. & inſult. pred. Sed per cur. 'tis will enough, and comprehends the whole, contra if it had been de inſult. pred. only, and the Preſentment, Traverſe and Tryal was all at the ſame day and Seſſions, ex aſſenſu, being a favour to the Party. Keeble 1 part, 879.

Ejectment. In Ejectment for him who pleaded all, of
Void in part. fourteen Acres, and the Jury find Guilty of twenty, the Plaintiff ſhall have Judgment for the fourteen, and the Verdict is void for the reſidue.

Information. Uſury. In an Information upon an uſurious Contract by two, 'tis not ſufficient to find a Contract by one. Otherwiſe where the Tort and offence is ſeveral, as againſt two upon the Statute 4 E. 6. Pro emptione butiri, and ſelling it by Retail, &c. and ſo in an Action upon the Caſe in Nature of Conſpiracy, and for words laid twice in one Declaration.

This

This will put in Iſſue the manner as well as the matter, where the matter is material, as the time of the Fact and other Circumſtances. *Modo & forma.*

The Plaintiff replies that W. made a Leaſe to him 30 Martij Habend. from Lady-day laſt, and Iſſue Modo & forma, and the Jury find a Leaſe made the 25 Martij Habendum extunc for a Year, this is good, although the time of making and commencement of the Leaſe are miſtaken, inaſmuch as extunc includes the Feaſt. Yet becauſe a ſufficient Title and Leaſe is found for the Plaintiff to put in his Cattel, this is ſufficient, this being the ſubſtance, and the Modo & forma ſhall not put the circumſtances in Iſſue. Replevin. Leaſe.

So in Treſpaſs, if the Defendant juſtifie the putting in his Cattel for Common, which he claims from Pentecoſt to a certain time every Year, which is traverſed Modo & forma, and the Jury find that he had Common in Vigilia Pentecoſtis in feſto, and the day next to this to the time, this is found for the Defendant.

But otherwiſe in theſe Caſes in an Aſſiſe of Common, becauſe there he ought to recover his Title.

In Debt for Rent, if the Defendant plead an Entry by the Plaintiff, before the Rent was due, ſcilicet ſuch a day which was after, and Iſſue upon the Entry Modo & forma, and the Jury find for the Defendant, he ſhall have Judgment, for the ſcilicet is void, and the Modo & forma go to the matter. See after.

In

Non eſt factum. In Debt upon a Bond, and the Defendant plead Non eſt factum, and the Jury find the Bond made jointly by another with the Defendant, the Plaintiff ſhall have Judgment; for the Defendant ſhould have pleaded this.

Deviſe. If a Deviſe be pleaded abſolute, if the Jury find a Deviſe upon a Condition precedent, 'tis not good.

Riens per Diſcent. In Debt againſt A. as Daughter and Heir to B. and the Defendant plead Riens per Diſcent of B. and the Jury find that B. was ſeiſed in Fee and dyed, having Iſſue the Defendant his Daughter, and his Wife with Child of a Boy, who was afterwards born alive, and died one hour after, this Iſſue is found againſt the Plaintiff, becauſe the Defendant had the Land as Heir to her Brother, who was laſt ſeiſed, and not to the Father, and ſo the Defendant had not the Land by diſcent from the Father, but from the Brother, yet this is Aſſets in her Hands if it had been ſpecially pleaded.

Error. In a Writ of Error brought by him in Remainder in Tail to reverſe a Fine, if the Defendant plead in bar of the Writ of Error, a Common Recovery by the Tenant in Tail; to which the Plaintiff replies, That at the time of the Recovery ſuffered, he himſelf was Tenant to the Precipe, and ſo the Recovery void, upon which

Part. Iſſue is joined, and the Jury find that he was Tenant of part, but not of other part. This iſſue is partly found for the Plaintiff, and partly for the Defendant, ſo the Court ſhall proceed to the examination of the Error,

nor; for that wherein he was found no Tenant; but 'tis a good Bar of the Writ of Entr. for that wherein he is found Tenant to the Precipe.

In Assumpsit to pay Money upon request, and Issue upon this, if the Jury find the Plaintiff promised to pay the Money, but do not say upon request, nor Modo & formâ, 'tis not found for the Plaintiff. Promise.

In Ejectment of a Mayor, if the Jury find that there were no Freeholders, and so by no Manner in Law, yet being a Manner by Reputation, and so the Tenements pass by the Lease; therefore this Verdict is found for him who pleads the Lease of the Manner, for the substance is, whether any thing was demised or not. If the substance of the Issue be found 'tis sufficient. Mannor.

In an Information of Extortion against the Gaoler of the Gaol, a Prison of the Castle of Maidton; the Jury found there was no Castle, but that there was a Gaol, this was for the Plaintiff, because Gaol is the substance. Gaol.

If the Issue be whether the Defendant had Accompted before R. and W. Auditors assigned by the Plaintiff, and the Jury find an Accompt before R. only, the Issue is found for the Defendant; for the Accompt is the Effect of the Issue. Vide Rolls tit. Tryal 707, &c. Accompt.

If eleven agree, and the twelfth will not, the Verdict of the eleven cannot be taken, but the Court may carry the Jurors with them in Carts until they are agreed. 41 Ass. 14. Jury agree.

Verdict altered.

A privy Verdict may be altered in open Court.

In an Extendi fac. upon a Statute, if the Jury deliver their Verdict in Writting, they may afterwards make it more formal, but they cannot alter it in substance, for it is a compleat Verdict by the delivery. So of Presentments, &c.

Fine and Non-claim.

A Fine pleaded in Bar, and that after the death of A scil 1 August, 3 Car. B. Father of the Plaintiff was alive, & in plena vita & remansit infra hoc Regnum infra quatuor Maria, &c. apud W. in Com. D. and no Entry or Claim within five years after, and the Plaintiff replies and takes Issue, Quod non fuit & remansit infra hoc Regnum Angliæ modo & forma, &c. And the Jury find Quod non fuit & remansit infra hoc Regnum Angliæ, 1 August, 3 Car. but that he was there 1 Maij, 4 Car. and remained there a Month, and refer to the Court, An fuit & remansit infra hoc Regnum modo & forma, &c. This Issue is found for the Defendant, for the matter and substance of the Plea is, whether he was within the Realm after the death of A. and five years before Entry or Claim per him or the Plaintiff, and modo & forma shall not make the day material. Rolls tit. Tryal 713.

Modo & forma.

Judgment, Arrest, at what time.

Judgment upon a Demurrer, and a Writ of Inquiry executed at the return, the party may shew any thing in Arrest of Judgment; for Judgment is not compleat until the last Judgment. The first is but an Award: A Man may plead any thing in Arrest of Judgment after a Verdict which

which will make Error if the Judgment be given.

In Debt upon a simple Contract against an Executor, if he will not plead in Abatement, but other matter which is found against him, he shall not afterwards alledge that he is not chargable in Arrest of Judgment.

So in Debt against Executors upon Arrearages of Accompt, where they are not chargable.

That which appears ill upon the same Record, but not a matter of Fact, which doth not appear upon the Record, because the parties cannot by the Issue. As that a Juror was challenged, and yet served on the Tales, for this cannot appear without alledging matter of Fact. Nor that the Defendants Attorny had no Warrant. But if there be any irregular or foul practice, this may be offered to set aside a Judgment. What may be alledged.

In Error upon Judgment in Durham, in Debt upon Bond to pay twenty pounds, The Defendant pleaded solvit ad diem, not saying where; a Verdict thereupon is void, because there is no Visne, and so no Tryal. Keeble 2 part, 620. Visne.

If any thing be omitted in the Declaration, or if more is put in the Declaration than is found by the Jury, if it make a material Variance betwixt the Mar. and the Verdict, the Action shall abate. Variance between the Verdict and the Declaration.

These following are adjudged material variances.

If the Declaration be for these Words, Thou procuredst eight or ten of thy Neighbours to perjure themselves, and the Jury find that he said, Thou hast caused eight or ten, &c. for he might be a common cause, scilicet causa sine qua non, without procurement. Mar. He is a Bankrupt. Wer. He will be a Bankrupt within two days. Mar. He is a Thief. Wer. He stole a House. Mar. Thou art a Murderer. Wer. He is, &c. Mar. I know him to be a Thief. Wer. I think him to be a Thief.

Words.

Inquisit.

So it is material Circumstance, if a special promise be laid to be upon Request, and the Verdict find it without Request. So if the Declaration be upon a Lease made by two, or by Baron and Feme, and the Jury find that one of them has nothing in the Land, or that the Baron only made the Lease, or that the two were Tenants in Common, and no several Leases, otherwise if they were Copartners.

So in Case that the Testator was indebted to the Plaintiff in fifty five pounds, and the Defendant being Administrator in consideratione, &c. promise to pay this, upon non Assumpsit, if the Verdict find the promise to be to pay thirty pounds, part of the fifty five pounds.

So in Ejectment, if the Nar. be of a Lease of three Acres, a Lease of a Poiery will not maintain the Nar.

Ejectment.

So in Waste, for cutting Trees, and the Verdict find that he eradicated the Trees, but did not cut them.

Waste.

A

A Preſcription in modo decimandi, That every one who hath ſeven Lambs, or under ſeven, ſhall pay to the Parſon ob. for every Lamb, and the Jury find that; and farther, That if he had more than ſeven Lambs, he ſhould pay a Lamb; and that the Parſon ſhould pay the Pariſhioner ob. This is not the ſame Preſcription, but makes a variance. Preſcription.

But if there be a Variance between the Verdict and the Nar. either by way of Surplus or defect; but if this matter of Variance be not material in the extenuation of the Action or Damages, the Action ſhall lie notwithſtanding the Variance. Variance.

Theſe enſuing are adjudged not to be material.

Nar. Strong Thief. Verdict. Thief. Nar. I ſay, &c. Ver. I affirm, or I doubt not. Nar. The Plaintiff will do ſuch a thing. Ver. I think in my Conſcience he will, &c. Nar. Of a Leaſe by a Parſon for five years; if he tam diu ſhould be Parſon, & tam diu viveret. And the Ver. find the Leaſe to be for five years, if he tam diu viveret without the words, and ſhould continue Parſon; for the Law implyeth, That if he be deprived or reſign, that the Leaſe determines. Nar. He is a Murderer. Ver. He was a Murderer; for when he ſays, He is a Murderer, 'tis not intended, that he did the Act in præſenti, but before. So in Treſpaſſes or Actions upon Torts and wrongs which are ſeveral, If the Verdict find part 'tis no material variance; and the Plaintiff in theſe Caſes ſhall have Judgment. Rol. tit. Trial 720.

A

Inquest by default.

A Jury of Middlesex was demanded in the Common-Pleas, the first day of the Term, and some appeared, and some not, so that here was not a full Jury, and neither the Defendant nor his Attorny did appear, and therefore the Plaintiff prayed, that the Inquest might be awarded by default; and by the Opinion of Welsh and Dyer, his prayer shall be granted, and the Custos Brevium, and all the Prothonotaries said the course was so, for the parties are demandable before the Jury, and if the Plaintiff make default, he shall be Nonsuited; and if the Defendant make default, the Jury shall be awarded by default, whether they appear or not. Dyer 265.

What the Defendant loses by his default.

Where an Inquest is taken by default, the Defendant shall lose his Challenges, and by 28 Ass. p. 42. Tit. Enquest in Fitz. he shall lose his Evidences also. Bro. Enquest 10. quod non est lex.

When the Defendant may be commended by default, and when an Inquest must be taken upon the default.

Det. The Defendant pleaded a Release, and the Plaintiff replyed Non est factum, and at the day of the Venire facias the Defendant made default, and the Inquest was taken upon his default, and found for the Defendant, for which the Plaintiff took nothing by his Bill; and yet if the Plaintiff had prayed it, he might have had the Defendant condemned by his default before the taking of the Verdict, Et sic vide folly in le Plaintiff. Bro. Ib. 5. But upon such Release and default in Trespass, the Inquest shall be taken by default, and the Defendant shall not be condemned by default, though the Plaintiff pray it, and the reason is,

is, because the Debt is certain, and the Damages are incertain in Trespass, Bro. lb. 3.

And Finch f. 409. hath well collected out of Brook, That always in an Action of Trespass, whatsoever the Issue be, Release, Justification, &c. and also in Debt, Detinue, Account, and the rest which are for things in certainty. if the Issue be taken upon a matter in fait only, as payment, or that an Acquittance pleaded in Bar by the Defendant was made by Dures, &c. The Inquest shall be taken by default, if the Defendant makes default; but in the last recited Actions of Debt, &c. if the Issue be upon the Acquittance it self, Release, or other matter in writing, the Plaintiff may pray Judgment upon the Defendants default, if he will; but if he do not pray it, the Jury shall be taken by default, as in an Action of Trespass.

The Jury may give a Verdict without testimony, or against testimony, when they themselves have conusance of the Fact. Plo. Com. 86. Verdict without, or against testimony.

The Jury are to find Costs and Damages in Debt, Trespass, Ejectment, Nusance, Covenant, &c. Debt for Tythes, treble value of the Tythes, and no Costs nor Damages.

In Audita Querela sur Statute, The Issue and value of the Land,

Waſte, Treble Damages.

Quare Impedit. 1. Whether the Church was void by the death of the Incumbent. 2. Whether it be now full or not? If it be full, at whose Preſentation? And if ſix Months be paſt ſince the laſt avoydance, and of what value it is by the year? and what Coſts and Damages?

The Verdict. In Dower, Inquiratur ſi vir obierit ſeizitus de tenementis præd. in dominico ſuo ut de feodo, aut de feodo talliat. Et ſi ita invenierint, tunc quantum tenementa illa valent per annum in omnibus exitibus ultra repriſas, juxta verum valorem eorund. & quantum tempus dilabitur a tempore mortis pred. viri, & quæ dampna peteus ſuſtinet tam occaſione detentionis datæ quam premiſſorum.

En Dower Nota. The Jury finding the dying ſeiſed, they muſt aſſeſs Coſts and Damages, but if they find the Husband was ſeiſed, but did not dye ſo, then no Coſts nor Damages, but only the value of the Land.

In Detinue, Si pro quer. de valore rei detent. & cuſtag. & dampna.

In Replevin, Damages for both Parties and Coſts.

In Account, No Damages no Coſts.

In placito terræ. Nulla dampna nec cuſtag Warrantia Chartæ Conſimile.

Aſſiſe Conſimile.

Prohibition, Si pro quer. tum enquir. de exitibus & non plus.

Partitione facienda, Si pro quer. tunc de exitibus & non plus.

En

En brief de Entry in le per. Cuſtag. & dampna.

In all real Actions generally no more than the Iſſue.

In Replevin, If the Plaintiff be called and do not appear, the Court takes the Verdict for the Defendant, and the Jury aſſeſs Damages and Coſts. But Nota, That a Verdict is not uſually taken in other Actions after the Plaintiff is Non-ſuit. Siderfin 2 part, 155.

CAP.

CAP. XIV.

How the Jury ought to demean themselves, whilst they consider of their Verdict; when they may Eat and Drink, when not; what Misdemeanor of theirs will make the Verdict void: Evidence given them, when they are gone from the Bar spoils their Verdict: For what the Court may Fine them, and where the Justices may carry them in Carts, till they agree of their Verdict. An Amercement Affered by the Jury.

Jurors ought not to eat or drink.

THere is a Maxim, and an old Custom in the Law, That the Jury shall not eat nor drink after they be sworn till they have given their Verdict, without the Assent and Licence of the Justices; and that is ordained by the Law for eschewing of divers inconveniences that might follow thereupon; and that especially if they should eat or drink at the Costs of the Parties; and therefore if they do so, it may be laid in Arrest of Judgment.

But with the assent of the Justices they may both eat and drink; as if any of the Jurors fall sick before they be agreed of their Verdict, so soon that he may not commune of

of the Verdict, then by the assent of the Justices he may have meat or drink, and also such other things as be necessary for him, and his fellows also at their own costs, or at the indifferent costs of the Parties, if they so agree, or by the assent of the Justices may both eat or drink: and if the Case so happen, that the Jury can in no wise agree in their Verdict; as if one of the Jurors knoweth in his own Conscience the thing to be false, which the other Jurors affirm to be true, and so he will not agree with them in giving a false Verdict, and this appeareth to the Justices by examination, the Justices may in such case suffer the Jury to have both meat and drink for a time, to see whether they will agree. And if they will in no wise agree, the Justices may take such order in the matter as shall seem to them by their discretion to stand with reason and conscience, by awarding of a new Inquest, and by setting Fine upon them, that they shall find in default, or otherwise as they shall think best by their discretion; like as they may do if one of they Jury dye before the Verdict, &c. Doct. and Student. 158.

For by assent of the Parties they may eat and drink. *Br.* Jurors.

New Inquest when the Jury cannot agree.

If the Jury after their Evidence given unto them at the Bar, do at their own charges eat or drink, either before or after they be agreed on their Verdict, it is finable, but it shall not avoid the Verdict; But if before they be agreed on their Verdict, they eat or drink at the charge of the Plaintiff, if the Verdict be given for him, it shall avoid the Verdict, but if it be gi-

Where, if the Jury eat or drink, it shall avoid the Verdict, and where only finable.

ven for the Defendant, it shall not avoid it; Et sic e converso. But if after they be agreed on their Verdict, they eat or drink at the charge of him for whom they do pass, it shall not avoid the Verdict. 1 Inst. 228.

To give the Jury Mony, makes their Verdict void by two Justices. Leon. 1 part. 18.

What delivered to the Jury after Evidence, shall avoid their Verdict. Littleton's Rep. 69. Keeble 1 part, 824.

If the Plaintiff after Evidence given, and the Jury departed from the Bar, or any for him do deliver any Letter from the Plaintiff to any of the Jury, concerning the matter in Issue, or any Evidence, or any Etcrowl touching the matter in Issue, which was not given in Evidence, it shall avoid the Verdict, if it be found for the Plaintiff; but not, if it be found for the Defendant, Et sic e converso. But if the Jury carry away any Writing unsealed, which was given in Evidence in open Court, this shall not avoid their Verdict, albeit they should not have carried it with them, Ibid.

How the Jury ought to be kept by the Bayliff.

When they may eat and drink. See *Smith's* Common. wealth. 74.

By the Law of England, a Jury after their Evidence given upon the Issue, ought to be kept together, in some convenient place, without Meat or Drink, Fire or Candle (which some Books call an Imprisonment) and without speech with any unless it be the Bayliff, and with him only, if they be agreed. After they be agreed, they may in Causes between party and party, give a Verdict, and if the Court be risen, give a privy Verdict before any of the Judges of the Court, and then they may

may eat and drink, and the next morning in open Court, they may either affirm, or alter their privy Verdict, and that which is given in Court shall stand. But in Criminal Cases of Life or Member, the Jury can give no privy Verdict, but they must give it openly in Court.

Where there can be no privy Verdict.

A privy Verdict may by taken in a Quo Warranto, Perjury, or whereever the King, is party, unless in case of like and death. Keeble 3 part, 459.

Neither can a Jury sworn and charged in case of Life or Member, be discharged by the Court, or any other, but they ought to give a Verdict. And the King cannot be Non-suit, for he is in Judgment of Law ever present in Court; but a common person may be Non-suit. And in civil Actions the Justices upon cause may discharge the Jury. Br. Enquest. 68, 47, 39. &c.

Where the Jury cannot be discharged before Verdict.

The King cannot be Non-suit.

In an Information by an Informer, qui tam, &c. the Informer may be Non-suited, 1 Inst. 139. Cokes Entries, Tit. Information, 394.

Information.

But this is against common practice; and I have known, that after a Jury of Life and Death have been sworn, and charged with Prisoners Arraigned, the Judge having been credibly informed, That it was a Jury pack't to favour some Prisoner, has discharged that Jury, and made the Sheriff return another presently.

In Hillary Term, Sexto H. 8. Rotul. 358. It was alledged in arrest of the Verdict at the Nisi prius, That the Jurors had eat and drunk. And upon examination it was found,

that they had first agreed, and that returning to give their Verdict, they saw Rede Chief Justice in the way going to see a Fray, and they followed him, Et in veniendo viderunt cyphum & inde biberunt. And for this every one of them was fined 40 d. And the Plaintiff had Judgment upon the Verdict. Dyer 37.

Jurors fined.

And Dyer 218. At the Nisi prius, the Jury after their charge given, returned and said, That they were all agreed except one, who had eat a Pear, and drunk a draught of Ale, for which he would not agree; and at the request of the Plaintiff, the Jury was sent back again, and found the Issue for the Plaintiff. And the matter aforesaid being examined by the Oath of the Jurors Separatim, and the Bayliff who kept them, and found true, the Offender was committed, and afterwards found Surety for his Fine. Si, &c. And Fitzherbert, the then Justice of Assise, gave him day in Banco, &c. At which day a Fine of twenty shillings was there assessed. Et quoad Bail. Curia advisare vult.

Jurors at the *Nisi prius*, fined in Bank, for eating Pears and drinking Ale.

In Trespass by Mounson against West, the Jury was charged, and Evidence given and the Jurors being retired into a House for to consider of their Evidence, they remained there a long time without concluding any thing, and the Officers of the Court who attended them, seeing their delay, searched the Jurors, if they had any thing about them to eat; upon which search it was found that some of them had Figgs, and others Pippins, for which the next day the matter was moved

Fined for having Figgs and Pippins about them.

moved to the Court, and the Jurors were examined upon Oath, and two of them did confess, that they had eaten Figs before they had agreed of their Verdict; and three other of them confessed, that they had Pippins but did not eat of them, and that they did it without the knowledge or will of any of the parties. And afterwards the Court set a Fine of 5 l. upon each of them which had eaten, and upon the others which had not eaten 40 s. But upon great advice and consideration had, and conference with rest of the Judges, the Verdict was held to be good, notwithstanding the said misdemeanor. Leon. 1 part, 133.

And see the Book of Entries, 251. The Jurors after they went from the Bar, ad seipsos, of their Verdict to advise, Comederunt quasdam species, scil. Raisons, Dates, &c. at their own Costs, as well before as after they were agreed of their Verdict. And the Jurors were committed to Prison, but their Verdict was good, although the Verdict was given against the King.

Fined for eating Raisins and Dates.

In Ejectione firmæ, it was found for the Defendant, three of the Jurors had Sweetmeats in their Pockets, and those three were for the Plaintiff, until they were searched and the Sweet-meats found, and then did agree with the other nine, and gave Verdict for the Defendant. It was the Opinion of the Justices, That whether they eat or not, they were finable for having of the Sweet-meats with them, for that is a very great misdemeanor. Godbolt 353.

Finable for having sweetmeats, *&c.* about them, though they do not eat them. See *Pla. Com.* 519. One fined and imprisoned for having *Sugar-Candy* and *Liquorish* about him.

40 As-

Jurors carted.

40 Assise Placito 11. The Justices said, That if the Jurors will not agree in their Verdict, the Justices may carry them in a Cart along with them till they are agreed.

The same Evidence given to the Jury, after they were gone from the Bar, spoils the Verdict.

The Jury were gone from the Bar, to confer of their Verdict, and one of the Witnesses before sworn on the Defendants part, was called by the Jurors, and he recited again his Evidence to them, and after they gave their Verdict for the Defendant. And complaint being made to the Judge of the Assises of this Misdemeanor, he examined the Inquest, who confessed all the matter, and that the Evidence was the same in effect, that was given before, Et non alia nec diversa. And this matter being returned by the Postea, the Opinion of the Court was, That the Verdict was not good, and a Venire facias de novo was awarded. Cro. last part, 189.

Trinity Term, 1653. between Wells and Tayler, Copies of a Bill, Answer and Depositions were proved, but not all read and delivered to the Jury, who carried them with them from the Bar in a bundle, which they laid by them and did not look on; yet their Verdict at the Bar was set aside for this cause, and the Court would not regard their saying, that they did not read them, for they might say that to save themselves; it being a fault to take any thing without the Courts knowledge.

If

If the Names of the Jurors be tranſpoſed in the Pannel of the Hab. Corp. As thoſe which were firſt in the Pannel of the Venire fac. be ſet laſt in the Hab. Corp. 'tis good cauſe for a new Tryal. So held in the Exchequer, 1694.

If the Venire be returned but not filed, the Pannel may be changed, but by Windham, not reaſonable the Jury returned ſhould be changed without motion. Keble 1 Vol. 562.

If a Party ſpeak to them.

If one of the Parties ſay to the Jury after they are gone from the Bar, You are weak Men, it is as clear of my ſide as the Noſe in a Man's Face. This is new Evidence, for his affirmation may much perſwade the Jury, and therefore ſhall quaſh the Verdict.

So if any of the Parties Servant ſpeak to the Jury, and the Verdict goes for his Maſter, it may be quaſhed, but if for the other ſide, 'tis only fineable, Keeble 300. 1 part.

So if any thing be read to them, which they ought not to have with them, as a Book of Depoſitions, ſome whereof were read in Evidence. Prat's Caſe, 21 Jac.

Eſcrowl delivered to a Juror before he was ſworn, vitiates the Verdict.

The Plaintiff delivered an Eſcrowl to a Juror impannelled, before he was ſworn, who afterwards being ſworn, and gone with the Jury from the Bar, to conſider of the Verdict, ſhewed the ſame Eſcrowl to his Companions, who found for the Plaintiff. The Miniſter who kept the Enqueſt, informed the Court hereof, and the Jury being examined, confeſſed the matter afore-

ſaid,

said, upon which Judgment was stayed; for after the Jury are sworn, they ought not to see nor carry with them any other Evidence but what was delivered to them by the Court: afterwards the Plaintiff said, That the Clerowi proved the same Evidence which was given to them at Bar by him; wherefore it was not so bad, as if it had been new Evidence not given before: Sed non allocatur. 11 H. 4. 17.

Church-Book delivered to the Jury, out of Court.

Pasch. 38 Eliz. Inter Vicary and Farthing, at the Nisi prius. The Issue was about Non-age, and two Church-Books were given in Evidence, one whereof was delivered to the Jury in Court, by the assent of Parties, and afterwards the other was delivered to the Jury out of the Court, by the Solicitor of the Plaintiff, without the assent of the Court, and a Verdict for the Plaintiff, and this was indorsed on the Postea; The Question was, whether this should make the Verdict void or no, for the Justices differed in Opinion, Popham and Gawdy, that it should not; Fenner and Clench, that it should; the Negative Justices gave these Reasons; That the Book was delivered in Evidence in the Court, and so the other Party might answer to it, and that the Court had informed the Jury of the validity thereof, how far they were to believe it, with many other Reasons: but the affirmative was urged, because there might be some matter in this Books to induce them otherwise than was intended before, and because it was delivered on his part, for whom the Verdict passed, without the Courts assent;

ent; yet one Book (scil. Cro. last part, 411.) ells us, Judgment was afterwards given or the Plaintiff. See More's Reports 452. The Books differ, for Cro. makes Clinch ive his Opinion for the Verdict. But More ings him on the other side, which I con- eive is truest; and for my part, I know o reason why foisting of Evidence to the ury, without the Court, should have any vour at all.

In the Case of Taylor and Web, Trin. 653. B. R. Twisden moved to set aside a erdict given at Bar; because that after vidence when the Writings were delive- ed to the Jury, some Writings which were ot sealed (and therefore ought not to be de- ivered to the Jury) were delivered by a tranger to the Jury.

Consider the Reasons in the formers cases

Hales Counsel of the other side, produces n Affidavit of the Foremans of the Jury, hat they made no use of them in giving heir Verdict, and that most of those Wri- ings were read in Court in Evidence up- n the Tryal, and Hales said, That if this hould avoid the Verdict, then that would e in the power of any Stranger unknown, nd against the mind of the Parties to avoid ny Verdict.

Roll; Chief Justice. The Affidavit of he Jury ought not to be allowed to make good their own Verdict, for now they are (as it were) Parties, and have offended, nd shall not be allowed by their own Oath o take off their Offence, and it is the Du- y of the Jury to look what Writings they eceive before they go from the Bar; and

if

if any such Paper be wrap'd up among other Papers delivered to them by the Court, so soon as they have discovered it, they should call in the Tip-staff, who keeps them and deliver it to him, and to certifie they made no use of it, and he said it would be dangerous to give the least way to the delivering of any Writings to a Jury.

And at another day Rolls cited 11 H. 4. 18. the Plaintiff (before the Tryal) delivered a Breviate of his Evidence to the Jury, which contained no more than was proved in Court, yet by this the Verdict was avoided; So Mich. 31 Eliz. C. B. Metcalf and Dean. After the Jury were gone from the Bar, they sent for one of the Witnesses and re-examined him, who gave the very same Evidence that he had before given in Court, yet the Verdict was avoided; and the reason of both is, a fear and jealousie that other matters might be given, &c.

37 Eliz. Farthing's Case, a Paper not under Seal, which was given in Evidence, was delivered to the Jury, this did not avoid the Verdict, because here can be no such fear; and by Roll, If any Writing (though not given in Evidence) be delivered to the Jury by the Court, it shall not avoid the Verdict. And in the principal Case the Verdict was avoided.

Escrowl from one who was no party.

Hill. 40 Eliz. Rot. 847. In Arrest of Judgment after Verdict, it was alledged, that a Juror delivered to his Companions an Escrowl for Evidence to them, which was not given in Evidence at the Tryal, and adjudged no cause to Arrest Judgment,

anless

unless it had been received from one of the Parties, which did not appear. More 546. but otherwise if it had been given by a party, and the Jury had found for him.

In the Case of Duke and Ventres, Mich. 656. B. R. tryed at Bar, one Mr. Beverly of Suffolk a Barrister was returned of the Jury, who (having been at a Tryal of the same Cause above twenty years before, in the Exchequer, and heard there great Evidence to make a Deed fraudulent, which was now the contest) demanded of the Court, whether he ought to inform the rest of the Jury privately of this, or conceal it, or declare it in open Court: The Court ordered him to come into Court, and deliver all his knowledge which he heard then proved (which Evidence was not now given, because the Parties were dead) and so he did being not sworn again, but only upon the Oath taken as a Jury-man.

And certainly it is of dangerous consequence to receive a Verdict against Evidence given, on supposal that some of the Jury knew otherwise, or on private Information given by one Jury-man to the rest, where he can't be cross examined; and let such Jurors beware of Attaint, but the best way is (as before) in open Court.

In a Writ of Error, the first Error assigned was, That Termino Trin. twelve Jurors, and no more, did appear. This ex assensu partium was adjourned untill Crastino Animar. on which day two others came in and were sworn, being of the first Pannel. Jury adjourned.

The

The Court all clear of Opinion, That this is no Error, this being good enough, they being all to be called again. Leon. 3 part, 38.

Juror depart.

If a Juror depart after he is sworn, he shall be Fined and Imprisoned, and by assent of Parties, another Juror may be sworn. Bro. Jurors 46. Lib. 5. 40.

If a Man be non-suited after the Jury is ready to give their Verdict, the Court may cause the Amercement of the Plaintiff to be presently assered by the Jurors. Lib. 8. 39.

If a Jury give their Verdict by Lot, 'tis a Misdemeanor and cause of a new Tryal, although in Prior and Powel's Case, Keeble 1 Vol. 811. A new Tryal was denied, because the Lot seemed there very innocent.

But see Keebles 3 part, 805. A Jury, on Affidavit, that they gave their Verdict on throwing crols and pile, were bound to appear to an Information; which 'tis said broke one of the Jurors Hearts. Keeble 1 part, 811.

The King against Marchant. Keeble 2 part, 404, 405.

Upon a motion for a new Tryal on the Judges Certificate that the Verdict was against Evidence in Perjury. The Court said there could be no new Tryal, for or against the King, and denyed it, but said the Certificate might mitigate the Fine.

Nota, The Court will not award new Tryals on the Jurors gain-saying their Verdicts, unless the Judge before whom it was tryed, conceived the Verdict to be given against Evidence. per Cur. 13 Car. 2. B. 5.

The

The Jury appearing and sworn in an Information of Extortion, The Court would not discharge the Jury upon a Cessat Processus, so the Attorny General caused the Clerk of the Crown to enter a Noli prosequi.

CAP. XV.

What Punishment the Law hath provided for Jurors offending; as taking Reward to give their Verdict. Of *Embraceors*. *Decies tantum*. Attaint. Several Fines on Jurors. What Issues they forfeit, and of Judgment for striking a Juror in *Westminster*, &c.

YOu have already heard how the Court may fine the Jurors for their misdemeanors in giving up their Verdict, I will proceed in shewing what punishments they are lyable unto, if they neglect their duty; and doubtless no men have more need of knowing what Penalties the Law inflicts on their Offences, than common Jurors, who too often being pre-ingaged with favour to the Plaintiff, or malice against the Defendant, Et sic e converso, or with common Interest (as they call it) where Tithes or Commons are in question; will neither

 grant

hearken to their Evidence, nor direction of the Judge, but subvert the whole visit of the Common Law, which will have them of the Neighbour-hood where the Fact was committed, to the end that they knowing most of the Fact, may consequently give the best Verdict; yet contrariwise, Jurors which live neerest, do now a days most commonly so fetter themselves with favour or animosities to the Parties; that those which live farthest off (as Juries from other Counties) for the most part give the clearest Verdicts. And how should the Judges remedy this mischief, but by severely punishing those Juries which offend? the Law in this will be their guide, for without doubt (excepting Life and Member) the Law hath provided more severe punishments against Juries, than against any other Offenders whatsoever, as well knowing that corruptio optimi est pessima: And common Jurors generally have nothing to do with this verse, Oderunt peccare boni, virtutis amore, Therefore 'tis fit they should be concerned it the next, Oderunt peccare mali, formidine poenæ; wherefore the description of what this poena is, shall be the conclusion of this Treatise.

The Penalty of Jurors taking Rewards.

If any Juror take a Reward to give his Verdict, and be thereof attainted, at the Suit of other than the party, and maketh fine, he which sueth shall have half the fine, and if any of the parties to the Plea, bring his Action against such Juror, he shall recover his damages. And the Juror so attainted shall have Imprisonment for one Year, which Im-

Imprisonment shall not be pardoned for any fine: This is by the Statute of 34 E. 3. Cap. 8.

Shall not serve of any other Inquest.

5 E. 3. Cap. 10. It is ordered, That if any Juror in Assises, Juries or Enquests, take of the one party, or of the other, and be thereof duly attainted, That hereafter he shall not be put into any Assises, Juries, or Enquests; and nevertheless he shall be commanded to Prison, and further ransomed at the Kings will. And the Justices before whom such Assises, Juries and Enquests, shall pass, shall have power to enquire and determine according to this Statute.

Imprisoned and ransomed, (that is) fined.

A Man would think that these Statutes should have frighted any Juror from taking Rewards to give his Verdict. But,

——Quid non mortalia pectora cogis
Auri sacra fames?

So sacred is this love of Mony, that Conscience her self must vail to it, and not stand in competition with such allurements: wherefore the Law did redouble its force; nay more, produced a Decies tantum, scil. That a Juror taking Reward to give his Verdict, shall pay ten times as much as he hath taken; which forfeiture, methinks, should make even those who love Mony best, refuse to take Mony upon such an account; because it is like a Canker in their Estates, depriving them in the end, of ten times more than it brought; for which, hear the Statute 38 E. 3. Cap. 12.

Decies tantum.

Item, As to the Article of Jurors, in the 24th year, it is assented and joyned to the same, That if any Jurors in Assises sworn, and other Inquests to be taken between the King and party, or party and party, to any thing take by them or other of the party, Plaintiff or Defendant, to give their Verdict, and thereof be attainted by Process contained in the same Article, be it at the Suit of the party that will sue for himself, or for the King, or any other person, every of the said Jurors shall pay ten times as much as he hath taken: and he that will sue shall have the one half, and the King the other half; and that all Embraceors, that bring or procure such Inquests in the Country, to take gain or profit, shall be punished in the same manner and form as the Jurors. And if the Juror or Embraceor so attainted, have not whereof to make agree, in the manner aforesaid, he shall have the Imprisonment of one Year. And the intent of the King, of Great Men, and of the Commons is, That no Justice or other Minister, shall enquire of Office, upon any of the points of this Article, but only at the Suit of the party, or of other, as afore is said.

Embraceor.

Upon which Statute there is a Writ called a Decies tantum; and who will may bring it, for it is a popular Action, and lyes (as you see) where any of the Jurors, after he is sworn, taketh of one party or of the other, or of both (and then he is called an Ambidexter) any Reward to give his Verdict, &c. And it may be brought against all the Jurors and

Ambidexter.

and Embraceors, although they take several Sums of Mony, and although the Jury give no Verdict, or a true Verdict. But it doth not lie against an Embraceor, if he taketh no Mony, and imbraces, or taketh Mony, and doth not imbrace. See Bro. Tit. Decies tantum 13. and F. N. Br. 171.

So F. N. Br. saith, but for my part, I think he is mistaken, for the Statute mentioneth nothing of his taking Mony; and in my Opinion, the Case of 37 H. 6. 13. is full against him.

An Embraceor is he that procures the Jurors in the Country, to take gain or profit, or comes to the Bar with the party, and speaks in the matter, or stands there to survey the Jury, &c. or to put them in fear, or solicits them to find on the one side or other, and this fellow cloaks his Embracery, under pretence of labouring the Jurors to appear, and to do their Conscience: And thus the Attornies in the Country, often take upon them to do, and many times put in a word or two for their Clients; which practice deserves the most severe punishment, next to their getting of the Sheriff to return such and such in the Jury, which they, having been under-Sheriffs themselves, and so agree with one another, are most expert at.

Embraceor.

Attornies ill practice.

But it was said by Rolls Chief Justice, That a Plaintiff might well intreat one Juror to appear, and that it was allowed in the Star-Chamber, but a Stranger could not labour one Juror to appear.

But Counsellors at Law may plead for their Mony at the Bar, but they must not labour the Jury privately; and if they take Mony for this, they are Embraceors. F. N. Br. 171.

Counsellors.

Fined for taking Mony after their Verdict.

So much doth the Law hate that Jurors should privately take Mony for their Verdict, That certain Jurors were fined, for taking Mony after their Verdict, though there was no pre-ingagament for it. 39 Assise. p. 19.

The practice is otherwise at this day; if it were not, the Middlesex Juries would so court the Bayliffs to return them, especially to Tryals at Bar, where five pounds a Man is frequent Gratuity, sometimes more.

Issues.

If a full Jury appear, and some are challenged off, so that the Jury remains for default of Jurors, the Defaulters shall lose their Issues. 4 H. 6. 7. Otherwise if a Jury be sworn, and one is withdrawn by consent.

But if there be a joynder of Counties, and a Jury of one County appear, and not of the other; The Defaulters of that County from which enough came, shall not lose their Issues, because the Inquest doth not remain for their default, but for the default of them of the other County. 48 Ass. 5. Mes quære.

Amercement.

If the Jurors at the return of the Scire facias make default, yet they shall not be amerced, because the parties may be claimed at the first day, but at the return of the Habeas Corpora they shall. 10 E. 4. 19. 1 E. 3. 12.

Demand sur peine.

If any of the Jurors appears, the Court may charge them to inquire if any of the other Jurors were within the Town after the return; and if they find they were, they shall

shall be demanded upon a Pein, and if they come not, they shall be amerced. Rolls Tit. Tryal 632.

A Juror were challenged, and six other Jurors were sworn to try the Challenge, who found him indifferent, and thereupon the Jury was demanded, but did not appear; for which default he was fined the value of his Lands for a year; and the other Jurors inquired of the value, &c. although the other party then would have challenged him when he was demanded, so that he might have been treit, but the Court would not admit this, because then the King would have lost his Fine. 36 H. 6. 27.

Juror fined for departing when he was challenged.

If a Juror appear, and is adjourned upon pain, and makes default, in this Case, because he shall be fined to the value of his Land per annum, this shall be inquired by his Companions of the Jury, because the Court knows not the value of his Land. Lib. 8. 41.

Juror adjourned upon pain.

A Verdict was taken from the Fore-man of the Jury, to which one of them did not assent, and Damages assessed to twenty shillings, in Trespass and Assault; and afterwards, every one of the eleven were fined, for giving their Verdict before they were all agreed. 40 Assise 10.

Fined for giving a Verdict before they were agreed.

Where a Jury are to be fined, a fine joyntly imposed on them, is not legal, but they must be severally fined, because the Offence of one, is not the Offence of another. Et nemo debet puniri pro alieni delicto. For then it might be said, Rutilius fecit, Æmilius plectitur. Lib. 11. 42.

The Fine must not be joynt.

Punishment for striking a Juror.

A Man struck a Juror at Westminster (sitting in the Court) who passed against him, and he was thereof Indicted and Arraigned at the Kings Suit, and attainted, his Judgment was, That he should go to the Tower, and stay there in prison all days of his Life, and that his right Hand should be cut off, and his Lands seised into the Kings Hands, 41 Assiz, p. 25. And now our Juror sees what punishment it is to strike him in the face of the Court, let him hold his Hands from others, lest the same Judgment light on him.

Issues.

By the Statute of 27 Eliz. Cap. 6. It is Enacted, That upon every first Writ of Habeas Corpora or Distringas, with a Nisi prius, Ten Shillings shall be returned a Issues, upon every person impannelled, and upon it the second Writ, twenty shillings, and upon the third thirty shillings. And upon every Writ that shall be farther awarded to try any Issue, to double the Issues last, afore specified, until a full Jury be sworn.

Non summoned.

And these Issues being returned upon a Tenement in Fee-simple, in Tayl or for Life, of another, or of himself, or in the right of his Wife; the Land he then hath will be chargable for it, and any Mans Cattel upon this Land may be distrained for it.

But if the Under-Sheriff, &c. return a Juror summoned, who in truth was not legally summoned, and therefore doth not appear, and so loseth Issues, the Under-Sheriff shall pay him double the value of the

Issues

…ames lost. See the Statutes of 35 H. 8. 6. and the 2 E. 6. 32.

And Note, The Law hath been so careful to punish all Offenders, who would endeavour to bryals and corrupt the Jury; and to punish the Juries themselves, if they receive Mony to give their Verdict, or any otherwise ye-ingage themselves to any of the parties, all which is to the end that a true and honest Verdict may be given: What punishment shall that Jury have which gives a false Verdict?

Such a punishment, that (as I said before) in civil Causes it is without Example: and surely, if the Jurors did bear it in their minds, their Verdicts would be always grounded upon their Evidence; and not upon their own Interest, or any partiality to either of the parties.

Wherefore if the Jurors give a false Verdict (which is Perjury of the highest degree) upon an Issue joyned between the parties in any Court of Record, and Judgment thereupon, The party grieved may bring his Writ of Attaint, in the King's Bench or Common-pleas; upon which 24 of the best Men in the County are to be Jurors, who are to hear the same Evidence which was given to the Petit Jury, and as much as can be brought in affirmance of the Verdict, but no other against it. And if these 24 (who are called the Grand Jury) find it a false Verdict; then followeth this terrible and heavy Judgment, at Common-Law, upon the Petit Jury. Attaint.

1. That

Judgment in Attaint.

1. That they shall lose Liberam Legem for ever, that is, they shall be so infamous, as they shall never be received to be a Witness, or of any Jury.

2. That they shall forfeit all their Goods and Chattels.

3. That their Lands and Tenements shall be taken into the King's Hands.

4. That their Wives and Children shall be thrown out of doors.

5. That their Houses shall be raised and thrown down.

6. That their Trees shall be rooted up.

7. That their Meadow Grounds shall be ploughed up.

8. That their Bodies shall be cast into the Goal, and the Party shall be restored to all that he lost, by reason of the unjust Verdict. So obious is Perjury in this Case, in the Eye of the Common-Law; and the severity of this punishment is to this end, Ut poena ad paucos, metus ad omnes perveniat; for there is Misericordia puniens, and there is Crudelitas parcens. And seeing all Tryals of real, personal, and mixt Actions depend upon the Oath of twelve Men, prudent Antiquity inflicted this severe punishment upon them, if they were attainted of Perjury. 1 Inst. 294.

But now by the Statute of 23 H. 8. Cap. 3. The severity of this punishment is moderated, if the Writ of Attaint be grounded upon that Statute.

But

But the Party grieved, may at his Election, either bring his Writ of Attaint, at the Common-Law, or upon that Statute, whereby let the Juror expect the greatest punishment, when he offends. 3 Inst. 163, 222.

And so I conclude as to the Juror, only with the Words of Fortescue, Quis tunc (etsi immemor salutis animæ suæ fuerit) non formidine tantæ pœnæ, & verecundia tantæ infamiæ veritatem non diceret sic Juratus?

Who then, though he regard not his Souls health, yet for fear of so great punishment, and for shame of so great Infamy, would not upon his Oath, declare the truth?

But as to our Practicer, I would give this one farther Advertisement, which relates also to Jurors.

When a Verdict has been given by a former Jury in the same Cause, and on the same Evidence, it is allowed to give the former Verdict in Evidence, and I have known this introduced by the Counsel, as obliging to the latter Jury, to find accordingly; intimating, that otherwise they do (in effect) perjure the former twelve Men, which may amuse tender minds, and draw them from the strict inquiry into the Merits of the Cause, in favour of their Predecessors which is a palpable mistake and misinformation, for these Reasons.

1. The same Evidence in the former Cause and Tryal (perhaps) was not so perspicuously delivered as in this.

2. This

2. This latter Jury may be of more sagacious and comprehensive Judgment than the former.

3. The Directions of the Court (which the Jury most need) may be more clearly delivered to this Jury.

4. The matter in Contest (perhaps) was not in the former Tryal so clearly manag'd by the Counsel, being not so well instructed as afterwards.

5. And Lastly, supposing the Evidence equally delivered by the Witnesses, apprehended by the Jury, directed by the Court, manag'd by the Counsel, yet its no Perjury or Fault to differ in Judgment; for if twenty four Jury-Men were to try a matter of Fact, and twelve were of one Opinion, and twelve of another, who is in Fault? while they Judge according to the best of their Knowledge and Skill, to which (only) they are sworn. And it's a reasonable kindness to Jury-Men, to make good Construction of differing Judgments among them, while we see how oft Judges themselves differ in their Opinions, on a matter stated equally to them all, and that (not only as to matter of Law, but) as to matter of Fact, as attending Practicers may observe in Tryals at Bar, in the several Judges several Directions. And this I thought good to Advertise, for that I have known Verdicts gained on this unwarrantable Suggestion, against clear and express Evidence, and could instances same Cases. Sed verbum sat, &c.

As to the difference betwixt the Judge and the Jury, and that Question which has made such

such a noise. Viz. Whether a Jury is finable for going against their Evidence in Court, or the Direction of the Judge? I look upon that Question as dead and buried, since Bushel's Case, in my Lord Vaughan's Reports; yet some of the Ashes thereof I may sprinkle here without Offence. It doth appear there to have been resolved by all the Judges, upon a full Conference at Serjeants-Inn, That a Jury is not fineable for going against their Evidence, where an Attaint lies. And that it is evident by several Resolutions of all the Judges, That where an Attaint lies the Judge cannot Fine the Jury, for going against their Evidence or Direction of the Court, without other Misdemeanour.

And where an Attaint doth not lie, as in Criminal Causes upon Indictments, &c. My Lord Vaughan says these Words, That the Court could not fine a Jury at the Common Law, where Attaint did not lie; I think to be the clearest Position that ever I considered either for Authority or Reason of Law. And one Reason for this (which can never be answered) is, The Judge cannot fully know upon what Evidence the Jury give their Verdict; for they may have other Evidence than what is shewed in Court. They are of the Vicinage, the Judge is a Stranger: they may have Evidence from their own personal knowledge, that the Witnesses speak false, which the Judge knows not of; they may know the Witnesses to be stigmatised and infamous, which may be unknown to the Parties or Court.

And if the Jury knew no more than wh
they heard in Court, and the Judge kne
so much as they, yet they might make diffe
rent Conclusions, as oftentimes the Judge
do; and therefore, as it would be a strang
and absurd thing to punish one Judge f
differing with another in Opinion of Jud
ment; so it would be worse for the Jury
who are Judges of the Fact, to be punish
for finding against the direction of him w
is not Judge of the Fact. But he th
would be better satisfied in this point, m
read that Case, and the Authorities a
Reasons given by my Lord Vaughan, whos
I must honour, as a Man of great Reason,

It is shewed in that Case, That much
the Office of Jurors, in order to their Ver
dict, is Ministerial, as not withdrawing fro
their Fellows after they are Sworn; n
receiving from either side Evidence aft
their Oath, not given in Court; not eat
ing and drinking before their Verdict; re
fusing to give a Verdict, and the like
wherein if they transgress, they are fin
able: But the Verdict it self when give
is not an Act Ministerial but Judicial, and a
cording to the best of their Judgment; fo
which they are not finable, nor to be punis
but by Attaint.

Nor can any Man shew, that a Jury wa
ever punisht upon an Information, either i
Law or the Star-Chamber, where the Charg
was only, for finding against their Evidence
or giving an untrue Verdict, unless Imbracery
Subornation, or the like were joyned.

But the Fining and Imprisoning of Jurors for giving their Verdict, hath several times been declared in Parliament an Illegal and Arbitrary Innovation, and of dangerous consequence to the Government; the Lives and Liberties of the People. This celebrated Tryal by Juries having been confirmed by many Parliaments.

Keble 2 part, 180. 1 part. 162.

Littleton, Sect. 368. tells us, That as the Jury may find the matter at large, that is a Special Verdict, (which the Court cannot refuse, if it be pertinent to the matter put in Issue) and leave the Law to the Court, so if the Jury will, they may take upon them the knowledge of the Law upon the matter, and may give their Verdict generally, as is put in their Charge. As for Example, upon all General Issues, as Not Guilty, pleaded in Trespass, Nil debet in Debt, Nul tort, Nul disseisin in Assise, Ne disturba pas in Quare Impedit, &c. Though it be matter of Law, whether the Defendant be a Trespasser, a Debtor, Disseisor or Disturber, in the particular Cases in Issue; yet the Jury find not (as in a Special Verdict) the Fact of every Case by it self, leaving the Law to the Court, but find for the Plaintiff or Defendant upon the Issue to be tryed, wherein they resolve both the Law and the Fact complicately, and not the Fact by it self. And so upon Not Guilty to an Indictment of Felony, breach of the Peace, Trespass, &c. and other Cases where the Law and the Fact are complicate and joyned, they may determine upon both; yet I must give them my Lord Coke's Caution, which is, That although the Jury, if they

Hardres Rep. 409.

they will, may take upon them the knowledge of the Law, and give a general Verdict, yet it is dangerous for them so to do; for if they do mistake the Law, they run into the danger of an Attaint. Therefore to find the matter specially, is the safest way where the Case is doubtful.

And to end, as I began, That Decantatum in our Books (as my Lord Vaughan calls it) Ad quæstionem facti non respondent Judices, ad quæstionem legis non respondent Juratores, litterally taken is true; for if it be demanded what is the Fact? the Judge cannot answer it. If it be asked, what is the Law in the Case? the Jury cannot answer it. But upon the general Issue, if the Jury be asked the Question, Guilty or not, which includes the Law, they resolve both Law and Fact, in answering Guilty or Not Guilty. So as though they answer not singly to the Question what is the Law, yet they determine the Law in all matters where Issue is joyned and tryed, but where the Verdict is special. But in such Cases the Judge cannot of himself answer or determine one Particle of the Fact, but must leave it to the Jury, with whom let it rest and continue for ever, as the best kind of Trial in the World for finding out the Truth; and the greatest safety of the just Prerogatives of the Crown, and the just Liberties of the Subject; and he which desireth more for either of them, is an Enemy to both.

FINIS.

PRECEDENTS

CONTAINING

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TO THE

ARRAY, &c.

AND THE

PROCEEDINGS thereupon.

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A Form of Challenge to the Array.

ET nunc ad hunc diem scilt. &c. venit pred' A. Quer' & B. Defend' p attornat' suos, & Juratores fuer' Impanellat' & demand & venerunt, & inde pred' B. Calumniabit Arraiam' panneli pred quia, &c.

This must be read by the Councel in French, and delivered to the Clerk to read it in Latin.

A Challenge to the Array, becauſe the Sheriff is Couſin, &c.

Et ſup hoc idem Henricus Vernon calumpniat Arraiamentū pannelli pdict quia dic quod pannellum illud arraiat fuit p quend Johannem Zouch Militem jam &c tēe Arraiament pred fact Vic pred Com Derb' qui quidem Vic eſt conſanguineus pred Johannis Manners, viz. filij Georgei Zouth Armig filij Johannis Zouch Mil fil Johannis Zouch Armig filij Johannis Zouch Armig filij Willielmi Domini Zouch filij Alan Dom Zouch filij Willielmi Domini Zouch filij Elizabethæ filie Willielmi Domini Roos Patris Willielmi Domini Roos Patris Thome Domini Roos Patris Elianore Patris Georgii Maners Militis Patris Thome Comitis Rutland Patris predict Johannis Maners Et hoc paratus eſt verificare unde petit Judicium ac quod pannellum pred calletur, &c. que quidem calumd per pred Tho. Stanley dedic per N. Sturley de Beachiff Armig &c R. F. de T. Ar Triatores ad hoc electos &c juratos compta eſt vera Ideo pannellum pred calletur, &c amobeatur, &c. Cokes Entries 340.

A Challenge becauſe the Sheriff is Tenant, &c.

Et ſup hoc idem Johannes Dom St. John dic qd J.D. Ar Vic Com pd jam exiſtit quodque idem J.D. tenet duodecim acras prati cū ptin in Budenham in Com pred de ipſo Johanne Domino St. John ad voluntatem per redd 40 s. eidem Johanni Domino St. John an-

annuatim solvend. Et ea de causa petit breve Domine Regine de Ven. fac. hic sicem, &c. ad triandum exitum pdict superius junct Coronatoribus eiusdem Domine Regine in Com pdict dirigend, &c. Super quo pdict Tho. dic qd pdict Jo. D. non tenet pdict vis acras prati cum pti nec aliquam inde pacem de pfat J. Domino St. John ad voluntat put idem Johannes Dominus St. John supius allegavit. Ideo non obstante Calumpnia pdict Jo. Domini St. John ad pfat Vic pceptum est eidem Vic qd Ven. fac. hic, &c. Cokes Entries 3[illegible].

A President of a Challenge for default of Hundredors which hath been several times made use of at the Assise.

Et sup hoc pdict A. B. p C. D. Attorn suum ven & Calumpd Arraiament pannelli pdict quia dic quod Villa de Dale in Com pdict in qua quidem Villa causa Actionis oritur & in narratione pdict quer locat & orit supponit est q. tempore Arraiamenti pannelli illius fuit & adhuc existit infra hundred de Downs in Com pdict quodq modo Vic Com pdict non Retorn seu impannellavit aliquos hundredores de hundred de Downs ad triand exit inter ptes pd modo junct nec Jur modo Jmpannellat & retorn habent seu aliquis eorundem Jur habuit vel modo habet aliquas terras seu tenementa infra hundred de Downs pdict nec habent habuer seu aliquis eorundem Jur habuit tempore Arraiamenti pannelli pdict seu unquam antea vel postea seu habitant vel commorant aut

aliquis eorundem habitabat vel commorat infra hundred pd modo vel tempore Arraiamenti pannelli illius Et hoc parat est verificare unde pet Judicium Et qd pannellum illud Caſſetur, &c.

This muſt be under Counſels Hand, and the Proceedings herein you may read before; if they Demur, thus,

[illegible] en Lege
W. T.
Joynder in Demurrer
G. D.

The Form of a Challenge made by the Defendant, becauſe the Plaintiff is the Sheriffs Couſin.

Et ſup hoc pdictus Defendens p A. B. Attornatum ſuum ven & Challengiat Arraiament pannelli pred quia dic quod pannellum illud fact & arraiat fuit p C. D. tunc modo & tempore Arraiament pannelli pd vic Com pd qui quidem vic eſt Conſanguineus E. H. Gen modo dimiſſionis quer in narratione pd quer mencionat videlt filius G. H. Gen filij K. L. filie M. N. filij O. P. Patris Q. R. Patris pd E. F. modo dimiſſoris quer in nar pd nominat Et hoc parat eſt verificare unde pet Judic & qd pannellum illud caſſetur, &c.

If the Plaintiff deny the Kindred and Affinity, then thus,

Nient Couſin par le manner
W. T.
eſt Couſin
G. D.

Then

Then are two or more Triors ſworn, but ſeldom more than two, and (after they have heard the Proofs and Evidence given to make good the Defendants Plea) they give their Verdict accordingly.

Note the Plaintiff may, if he pleaſe, demur upon the Challenge.

A Challenge to the Array, becauſe no Knight was returned upon the Jury.

Et ſuper hoc ponitur Comes per A.B. Attorn' ſuum ver' & Calumpn' Arraiament' panneli Aſſiſe pred' quia dic' q̄d ipſe eſt & tempore Arraiament' panneli illius & antea fuit & adhuc eſt unus magnat' & parium hujus Regni Angliæ & vocem & locum in quolibet Parliamento ejuſdem Regni habens Et q̄d Arraiament' Aſſiſe panneli p̄d' Arrat' fuit per C. D. p̄d' ſuper vic' p̄d' Comd E. nullo p̄dict' in eodem panello Arraiament' illius fact' & retorn' exiſtend' aut eſſe debuit ſecundum legem hujus Regni Angliæ Et hoc paratus eſt verificare unde per Judicium Et quod panellum illud caſſetur, &c.

Vies Mes Challenge in le Lieu de Monſieur Plowden, & Demurrer ſur ceo, joinder in Demurrer & Judgment que le panel ſoit caſſe en le Caſe del Count de Darby, fol. 117.

A Challenge against the Sheriff for returning the Jury at the Instance, Request and Denomination of the Plaintiff.

Et sup hoc eadem A. B. p C. D. Attorn suum ven & Calumpn Arraiament pannelli ejusdem Jure quia dic qd pannellu illud fact & arraiat fuit p E. H. Vic mod Vic Com pd & Ministros suos ad denominationem & promotionem ipius quer in favorem ejusdem quer & hoc prat est verificare unde petit Judicium & quod pannellum illud cassetur, &c.

To which the Plaintiff may plead that the Array of the Pannel pd bene & equaliter factum & arraiat fuit p pdict Vic & Ministros suos, &c. juxta officij sui debit.

Or the Plaintiff, if he will, may confess it; But if he plead, then the Judges immediately assign Tryors to try the Array, which seldom exceed two, who being chose and sworn, the Associate or Clerk in Court doth declare and rehearse unto them the matter and cause of the Challenge, and after he hath so done, concludes to them thus. And so your Charge is to enquire whether it be an even and Impartial Array, or a favourable one: And if they affirm it, then the Clerk enters underneath the Challenge.

Affirmatur.

But

But if the Tryors find it favourable, then thus,

Calumpnia vera.

A Challenge becauſe that the Town is within an Hundred of which the Plaintiff is Lord, and prays a Writ to the next Hundred.

Et ſuper hoc pd A. dic quod pdict Villa de Dale in qua tranſgr pred ſupa fuit eſt infra hundred de B. Et quod ipſe eſt Dominus ejuſdem hundredi quodque omnes lib. Tenentes infra hundredum illud ſunt infra diſtrictionem ipſius A. Et ea de cauſa pet hd Dond Regis de Venire faciend hic rit, &c. ad triand exitum joindum de mor' vill' in Com pdict extra hundred pdict Ville de B. mor. adjacen Vic Com pred virtrigend Et quia pred Defendens hoc non dedicit ei conceditur, &c. Jo preept eſt Vic quod Venire fac hic in Octab Sancti Hillarii rit, &c. de mor. vill' in Com pdict extra hundred pdict predicte Ville de Dale mor. adjacen p quos, &c. Et qui nec, &c. ad Recogn', &c. quia tam, &c.

Challenge becauſe the Sheriff and two Coroners are Tenants of the Plaintiff, and a Ven. fac awarded to the reſt of the Coroners.

Et ſuper hoc pdict A. B. dic quod tam pd C. D. Miles nunc Vic Com pdict qm E.F.

& G. H. duo Coron' sunt Tenentes ipsiu nunc I. & infra districtionem suam Et o de causa per Breve ipsius Domini Regi de Ven. Fac. hic xij &c. E. A. & R. P. re Coron' ejusdem Domini Regis in Com predict' dirigend' ad triand' exit' pred' & qui predict' W. hoc non dedic' ei concedetur, &c. Ideo precept' E. A. & R. P. quod Ven' fac hic, &c.

Challeng where after the last continuance the Cousin of the Plaintiff is made Sheriff af Issue joined.

Quia tam, &c. Ad quem diem hic ven partes, &c. Et Vic' non misit breve Et super hoc premissis Quer' dic' quod post ultimam continuationem placiti ulter' post Octab' Sancti Michaelis ultimo preterito de quo die loquela pred' ult' continuat' fuit hic usque ad hunc diem scilicet tali die ultimo preterito Dominus Rex nunc per Literas Patentes constituit quendam A. B. Militem custodem Com' predict' quarum quidem Literarum Patent' prextu idem Vic' Com' illius jam existit Qui quidem A. B. est Consanguineus predict' Quer' vizt' fil', &c. Et ea de causa per breve Domini Regis de Venire fac' hic xij, &c. Coron' dic' Dom' Regis Com' pred' dirigend' Et quia predict' Defendens non dedicit ei concedit', &c. Et precept' est Coron' Dom' Regis Com' predict' quod Ven' fac', &c.

Chal-

Challenge becauſe the Sheriff is of Councel with the Plaintiff, and hath received Fees, and the Defendant doth deny the Challenge, therefore the Venire facias awarded to the Sheriff notwithſtanding.

Et ſuper hoc p̃dictus Quer' dic' quod quidam A. B. Vic' Com̃ p̃red' modo exiſtit qui quidem A. B. eſt de conſiliis ipſius Quer' & habet de eodem Quer' annuum Redditum ſive feod' xx l. Et ea de cauſa per bre Dom̃ Regis de Venire faciend' hic xij, &c. Coron' Dom̃ Regis Com̃ p̃dict dirigend' Et quia p̃dictus Defendens hoc non dedicit Ideo non obſtante allegatione p̃dicti Quer' preceptum eſt Vic', &c.

Challenge becauſe the Plaintiff is Brother to the Sheriff.

Et ſuper hoc idem Querens dicit quod A. B. Miles Vic' Com̃ p̃dict' exiſtit Frater ejuſdem Quer' & ea de cauſa per breve Domini Regis de Venire faciend' hic xij, &c. Coron' dic' Dom̃ Regis Com̃ p̃d dirigend' Et quia p̃red' defendens hoc non dedicit conceditur, Ideo, &c.

Challenge where the Plaintiff is Sheriff, and one of the Coroners is his Tenant.

Et ſuper hoc p̃d Quer' dic' quod ipſe eſt Vic' Com̃ p̃dict & quod ſunt in eod̃ Com̃ duo Coron' videlicet R. H. & R. D. quodque idem

Paſch. 24 H. 8. Rot. 138. idem R. H. unus Coron̄ ejuſdem Coron̄ tenet de ipſo quer' unum Meſſuagium, &c. ꝑ fidelitatem & annuum reddit' ſingulis annu ad feſta, &c. ꝑ equales portiones ſolvend' Et eis de cauſis per bre Dom̄ Regis de Ven̄ fac hic xij, &c. Plaſ R. D. alt' Coron̄ Com̄ ꝑdict dirigend & quia, &c. conceditur Et ꝑcept eſt eidem R. D. quod, &c.

Another Challenge to the ſame purpoſe.

Paſch. 20 and 21 H. 8. Rot. 424. Et ſup hoc idem quer' dic' quod A. B. Vic, &c. tenet decem acras terræ cum ptin̄, &c. de ipſo quer' ut de Manerio, &c. ꝑ fidelitatem, &c. Et ea de cauſa per breve ut ſupra.

Challenge becauſe the Wife of the Plaintiff is kin to the Sheriffs Wife.

Mich. 11 H. 7. Rot. 453. Et ſup hoc idem Querens dic' quod ꝑdicta Bridgitta nunc uxor H. I. modo Vic' Com̄ ꝑd Conſanguinea A. uxoris Plaſ quer' videlicet filia M. ſororis ipſius A. uxoris Plaſ huic Et ea de cauſa per breve, &c. Coron̄, &c.

Challenge becauſe the Plaintiff is the Sheriffs Servant.

Et ſup hoc idem Quer' dic' quod ipſe eſt ſerviens & de lib. R. T. Militis modo Vic' Com̄ ꝑd & ea de cauſa, &c.

Challenge after the Jury Impannelled, return'd and called, because the Prior in Aid is Sheriff, and of the Councel of the Plaintiff, and a Distringas Jur' with a 10 Tales Cozon awarded.

Et modo hic ad hunc diem ven' tam pr̃ed̃ R. ac ꝑdict J. S. & W. V. qui se separatim junxer', &c. quam pr̃ed̃ W. M. per Attornatum suum pr̃ed̃ & Jur' inde impannellat' existit quidam eorum ven' & quidam eorum non ven' prout patet in pannello, &c. & super hoc pr̃ed̃ R. H. ac pr̃ed̃ J. S. & W. V. qui separatim junxer', &c. dic' quod pr̃ed̃ J. S. modo dic' Com' ꝑdict' extitit quodque idem J. S. est de feodo pr̃ed̃ W. & consilio in pr̃emissis & aliis negotiis suis & aliis de causis pet̃ breve de distring̃ Jur' Jure ꝑdict' unacum decem talibus de visu pr̃ed̃ eis imponend̃ Cozon Dom' Regis Com' ꝑdict' dirigend̃ super quo fuit est a ꝑdict W. M. siquid p̃ se habeat vel dic' sciat quare breve illud Cozon Dom' Regis Com' ꝑdict distring̃ Jur' Jure ꝑdict unacum decem talibus de visu ꝑdict eis imponend̃ ratione p̃missorum fieri non debet quia dic' quod non Ideo p̃cept' est Cozon Dom' Regis ꝑdict quod distring̃ Jur' Jure ꝑdict p̃ omnes terras, &c. & quod de exit', &c. Ita quod habeat corpora, &c. ad fac' Juram ꝑdict' Et appon' ei decem tales, &c.

Sur Hill. 9 H. 8. 343.

Chal-

Challenge becauſe the Plaintiff is one of the Sheriffs of London, and the Venire fac awarded to the other Sheriff.

Et ſuper hoc Policius Querens dic̃ quo ipſe ac quidam Johannes Blunt Miles ſun Vic̃ London & p eo quod ipſe eſt unus Vic London per quod proceſſus de Venire fac b ris, &c. ad triand' exit̃ predictum inter J. B tantum dirigetur, &c. & quia eſt Plac n ſeins ſummo dicere ſciat quare proceſſum ſu preſat̃ Johanni Blunt altero Vic̃, &c. tantu e a ratione dirigi non debet qui Vic̃ quod nu Ideo Concept̃ eſt eidem Johanni Blunt alter Vic̃, &c. quod Venire fac̃ in Banco Ita quod pd querens in nullo ſe intromittu ris, &c. per quos, &c. & qui nec, &c. ad re cognit̃, &c. qui tam, &c.

Challenge to the Deputy Sheriff, becauſe he Impannelled and returned the Jury at the inſtance and denomination of the Plaintiff.

Et ſuper hoc pred defendens Calumpn̄ Arraiamentum pannelli predicti pred eo quod pannellum illud factum & arraiat̃ fuit per T. W. ſub Vic̃ Com̄ pred ad denominacionem Pd quer' in favorem & promocionem ejuſd̄ quer' quequidem Calumpnia per Triatores ad hoc elect̃ & Jurat̃ Comperta eſt vera Ideo, &c.

Chal-

Challenge by the King's Serjeant upon an Indictment of Felony, because the Sheriff returned the Jury of Life and Death, at the instance and request and denomination of the Prisoner.

Laurentius B. nuper de A. in Com̃ p̃dict̃ ven̄ capt̃, &c. Recitatum fuit̃ indictamentum usque Ideo fiat inde Jur̄, &c. sup̃ quo A. B. serviens ad̃ Dñi Regis ad legem p̃ eodem Dñico Rege Calumpn̄ Arraiamentum inmittit Jurat̃ p̃dict̃ quia dic̃ quod pannellum illud fuit̃ & existit̃ fuit̃ p̃ Henricum Forstone Nup̃ Com̃ p̃dict̃ ad denominationem p̃dict̃ Laurentij & in mense & promotione ejusdem Laurentij quæ quidem Calumpn̄ p̃ Laurentium fuit̃ Jur̄ compert̃ est̃ vera Ideo pannellum annullatur & cassetur, &c. & Venire fac̃ awarded to the Coroner.

Challenge by the King's Serjeant for the King to some of the Jury for default of Freehold, to the value of 40 s. per Annum.

Sup̃ quo facta publica p̃clamatione p̃ Dño Rege, &c. ac quidam J. G. p̃dict̃ serviens dic̃ Dñi Regis ad legem nunc p̃ eodem Dñi Rege ven̄ & quidam Jur̄ modo comparen̄ videl̃t J. L. in Jurand̃ p̃d̃ Jurat̃ existit Et quia ressid̃ Jur̄ exist̃ Jur̄ modo Comparen̄ non habent terras seu tenementa in Com̃ p̃d̃ ad annuum valorem xl s. a panneł illo penitus extrahuntur, &c.

Mich.

Entry of a Challenge after Issue joyned where the Sheriff is amoved, &c.

Mich. 23 and 24 Eliz. Rot. 109. Therefore came thereupon the Jury before our Lord the King at Westminster, the day, &c. and who neither, &c. to Recognize, &c. because as well, &c. the same day is given to the said Parties there, &c. at which day before the said King at Westminster, came the said Parties by their said Attornies, and the Sheriff sent not the Writ; and upon this, the same Plaintiff saith, That after the last continuance of the said Plea, that is to say, after the Saturday next after, &c. now last past; from which day the said Plaintiff was continued here until this day, that is to say, the day, &c. R. P. Esq; late Sheriff of the said County of E. from the same Office of Sheriff of that County was duly amoved, and the said King now by his Letters Patents hath committed unto one T. P. Knight, the Custody of the said County of E. by pretence of which said Letters Patents, the said T.P. now remaineth Sheriff of that County, which said T. P. of A. at A. aforesaid, took to his Wife Anne of the Blood of M. now the Wife of him the Plaintiff; that is to say, the Daughter of R.D. the Son of W. D. Knight, Father of Anne, Mother of the said M. now Wife of him the Plaintiff; which said T.P. Knight, and A. had Issue between them A.P. yet alive, and in full life remaining, at A. aforesaid, and this he is ready to prove, &c. And for that cause he prayeth a Writ of our Lady the now Queen, of Venire fac. to try the said Issue in form aforesaid joyned, to be directed to the Coroners of the said County; and because the said Defendant doth

Between *Barkley* and *Jefferson*.

oth gain-say, and doth not grant that to be true, therefore notwithstanding the same Challenge, a Command is to the Sheriff, that he make to come Twelve, &c. of the Visne of B. by whom, &c.

Challenge gain-said.

Easter Term, 38 H. 8. Rot. 558. And hereupon the Defendant doth Challenge the Array of the Pannel of the said Jury, because he saith, That that Pannel was made and arrayed by A. and C. Coroners of the said County, at the Denomination and in favour of the Pannel of the said Plaintiff, and this he is ready to verifie, and requesteth that the same Pannel may be quashed. And the said Plaintiff saith, That the said Pannel by the said Coroners, was well and equally made; and not at the denomination, or in favour, nor in promotion of the said Plaintiff; whereupon the said Justices by the consent of the said Parties, did chuse and assign D. and E. two of the said Jury now appearing, to try the said Challenge; which said Tryors being elected and tryed, say upon their Oaths, That the said Pannel was well and faithfully made and arrayed by the said Coroners, and not at the denomination, neither in favour, nor in promotion of the said Plaintiff; whereupon the Jurors of the said Jury being called, tryed and sworn, say, &c.

Challenge to the Array, because the Coroners made the Pannel at the Denomination of the Plaintiff.

A Precedent of Challenge to the Array.

May it please you, My. Baron, This Enquest you ought not to take, for that Sir John Ramsden, Knight, Sheriff of the County of

York, who did return the Pannel between the said A. Plaintiff, and B. Defendant, is Cousin to the Plaintiff, &c. and shew how of Kin, &c. and so where the Challenge is for lack of Hundredors, or other principal Challenge, put it down, &c. and this he is ready to aver, whereof he prays Judgment, and that the said Pannel be quashed.

Or thus, And now at this day S. &c. comes the aforesaid J. S. Plaintiff, and J. B. Defendant by their Attornies, and the Jurors also Impannelled and demanded did come, and thereupon the said J.B. doth Challenge the Array of the Pannel aforesaid, because &c.

This must be put in Writing, but under Counsels Hand; where the Challenge is to the Poles, it is a short way by a Verbal Challenge; see the Learning of this is excellent and copious in our Book.

A Precedent of a Plea after the last Continuance.

And now at this day, &c. comes such a one Defendant, by J.C. his Counsel, and saith, This Action the Plaintiff against the Defendant ought not to maintain; for that after the Quindene of the Holy Trinity last past, from which day until such a day in Michaelmas-Term next, unless the Justices of Assises come before such a day, &c. the Action aforesaid is continued, &c. the Plaintiff by his Deed dated, &c. did Release, &c. and shew, &c. the Matter what it is, whether in abate-

abatement in Bar dilatory, or peremptory, as the Case is, &c. and this he is ready to aver.

Note, Brook in his Abridgment, Tit. Continuance. 61 and 83. says, That after the Inquest is awarded to inquire of Damages, The Defendant cannot plead a Plea Puis le darrein Continuance, because he hath no day in Court to plead.

The day of Nisi prius and day in Bank are all one; so that a Release made betwixt these days cannot be pleaded in Bank; but it seems that a Release made between the day of the Venire facias retorned, and the Writ of Nisi prius awarded, and the day of the Nisi prius may be pleaded at the day of the Nisi prius, but not after the Verdict, 21 H. 6. f. 10. Bro. Tit. Juror, &c. 31 Tit. Continuance, 76 42, 27, 13.

A Man shall have but one Plea after the last Continuance; for the Plaintiff shall not be delayed ad infinitum, 16 H. 7. 11. Bro. Tit. Continuance, 59. 41. 45, 46. 5. 21.

After the Inquest taken by default, and before Judgment, the Defendant came and pleaded an Arbitrement made after the last Continuance; and by the Opinion of the Court, he had no day in Court to plead this Plea, and 'twas said, That he could Plead no Plea in such Case, but as Amicus Curiæ, and of matter apparent he shall be received; otherwise, he must resort to his Audita Querela. 21 H. 7. 33. Broke Ibid. 38.

But if the Jury remain for default of Jurors, the Defendant may plead a Releaſe, &c. at the day in Bank Puis le darrein continuance, although he did not offer it at the Niſi Prius, otherwiſe if the Jury had been taken at the Niſi Prius. 22 H. 6. 1. Brook ibid. 30.

If it be pleaded at the Niſi Prius, the Court Record the Plea, and diſcharge the Inqueſt, and give day to the Parties in Bank. Ibid. 34. 8.

In Debt after Iſſue joyned, the Defendant at the Niſi Prius pleaded payment of part after the latter continuance in Abatement. And the Jury being diſcharged, and the Plea adjourned in Bank, for that no place of payment was pleaded, the Plaintiff had Judgment to recover his Debt, becauſe after Iſſue joyned, no Reſpondeas ouſter can be awarded. L. 5 E. 4. 139. Aleyn's Rep. 66. in the Caſe of Beaton and Forreſt.

Now, although when difficulty ariſes in the Evidence, the matter is moſt commonly (of late) found ſpecially, and Demurrers on the Evidence are ſeldom uſed; yet in almuch as it is ſometimes done, and that our Practicer may be prepared with an Authentick Precedent for that purpoſe, I ſhall tranſcribe one out of Cokes Entries, f. 144. viz.

Poſtea ſſ. Poſtea die & loco infracontent coram Jacobo Dyer Milite Capitali Juſticiar Dom̃ Regine de Banco & Nicholao Barham uno ſervient dict Dom̃ Regine ad Legem Juſtic ipſius Dom̃ Regine ad Aſſiſas in Com̃ M. Capiend aſſign p formam Statuti, &c. Ven infranominat J. A. qua infraſcript H. C. p at-

atturnat̃ suos infra content̃ & Jur' Jure unde infra fit mentio Exact̃ similit̃ vener' Qui ad veritatem de infra content̃ dicend̃, electi, triati, & Jurati fuer' super quo * pred̃ H. per quendam J. B. de Consilio ipsius H. C. manutentione exitus interius junct̃ Cozam pred̃at̃ Just̃ Jur' pred̃ in Evidentijs ostens̃ & dic̃ quod, &c. [Here recite the Evidence truly] unde petit Judicium & quod Jur' pred̃ veredict̃ suum de & super infra content̃ pro ipso H. reddant, &c.

* E. D. De Consilio pred. J. A. produxit quosdam J. D. & T. B. ex parte Quer. ad probandum Exit. pred. qui quidem J. D. jurat. existen. dedit in Evident. Jur. pred. & juravit in his Anglicanis verbis, videlicet, *That upon discourse*, &c. [*and so recite his Evidence.*) Et pred. T. E. jurat. existen. dedit in Evident. Jur. pred. & juravit in his Anglicanis verbis, videlicet, *That*, &c. [*And so recite his Evidence,*] Et supra inde H. P. ex consilio Def. dixit quod materia pred. superius in eadem dat. non fuit sufficiens in lege ad manutenend. exit. pred. Et moratur in Lege super Evidenc. pred. Et hoc, &c. Et pet. &c. Et pred. causis ex parte pred. Quer. dixit quod fuit sufficiens in Lege Et hoc, &c. Et pet. &c. super quo Jur. pred. super sacrm' suum dic. si Lex sit cum Quer. quod pred. Def. est Cul. de infracontent. modo & forma prout pred. quer. interius narravit quodque pred. quer. occasione premis. sufficient. dampn. ad 11 *l.* ultra mis. & custag. Et pro mis. & custag. illis and 40 *s.* Et si Lex sit cum Def. Jur. pred. dic. quod pred. Def. non est cul. modo & forma prout pred. quer. interius versus eum queritur.

Et pred̃ J. A. p̃ quend̃ C. J. de Consilio suo dic̃ q̃ materia p̃d̃ per p̃fat̃ H. C. Jur' p̃d̃ superius in Evidentijs ostens̃ minus suff' in lege exist̃it ad p̃band̃ exitum interius Junct̃ p̃o p̃te ejusdem H. quodq̃ ipse ad materiam illam in forma p̃d̃ in Evident̃ ostens̃ necesse non habet nec p̃ legem terre tenet̃ respondere, & hoc paratus est verificare, unde p̃o defectu sufficient̃ mater' Jur' pred̃ in hac p̃te ostens̃ idem J. petit Judic̃ & quod Jur' de Veredict̃ suo super Exit̃ pred̃ reddend̃ exone-

rentur & debitum suum infra spec unis cum damn suis occasione detent debit illitis ubi adjudicari, &c.

Joynder. Et pd H. C. Et quo ipse sutis mater in lege ad manutenend exit infra content pro parte ipius H. Jur pd superius in Evidenc ostens. qd ipse pat est verificare, quod quidem materia pd J. non dedicit nec ad eam aliqualiter respond seu verificationem illam admittere omnino renuat pet Judic, & quod pdict J. ab actione sua pred versus eum habend precludatur, ac quod Jur pred de Verdict suo super exit pred reddend exonerentur, &c.

A Precedent of a Demurrer upon the Evidence.

And now at this day the said Plaintiff and Defendant by their Attornies did appear, and the Jury likewise did appear and were sworn, &c. upon which Sir T. W. Serjeant at Law, of Counsel with the Plaintiff, gave in Evidence so and so, and repeat it truly, and did require the Jurors to find for the Plaintiff, upon which J. C. of Counsel with the Defendant saith, That the Evidence and Allegations aforesaid alledged, were not sufficient in Law to maintain the Issue joyned for the Plaintiff, to which the Defendant needeth not, nor by the Laws of the Land is not holden to give any Answer; wherefore for default of sufficient Evidence in this behalf, the Defendant demands Judgment, that the Jurors aforesaid of giving their Ver-

Verdict be discharged, &c. and that the Plaintiff be barr'd from having a Verdict, &c. Then the Plaintiff joyns and says, That he hath given sufficient matter in Evidence, to which the Defendant hath the given no Answer, &c. and demands Judgment, and that the Jury be discharged, and that the Defendant be Convicted; then the Jury may give Damages, if Judgment shall happen to be for the Plaintiff, &c.

A Bill of Exception.

Memorandum, That the 1st day of August, Anno 1650. before T. P. and W. Justices of our said Lord the King, for taking Assizes in the said County assigned, in a Plea of Trespass and Ejectment, which J. S. in the Court of our said Lord the King before himself, by Bill hath prosecute against E. B. supposing by the said Bill, that the aforesaid T. B. &c. [And recite the substance of the Declaration, or what it is, &c. and the Issue, and then what the Evidence to prove the Defendant guilty was,] Which here was a Surrender of a Copy-hold out of Court, &c. and that he desired the Jury aforesaid to give their Verdict for the said T. B. of and upon the Premisses, and that he likewise desired the Judges aforesaid, that they would inform the Jury aforesaid, that the Surrender aforesaid out of Court made, was good and effectual in Law, and the aforesaid Justices, the aforesaid Surrender of the Land aforesaid, with the Appur tenances made out of Court, Ebor. sc.

Court, of the Manner aforesaid, in form aforesaid, did affirm to the said Jurors was not good in Law, by which the said Thomas for that the aforesaid matters to the said Jurors in Evidence shewed, ought not appear, &c. did request of the said Justices, according to the form of the Statute in such Case provided this present Bill, which doth contain in it the matter aforesaid, above by him to the Jurors aforesaid shewed, by which the said Justices, at the request of the said Thomas, this Bill have sealed at D. aforesaid.

Clayton's Rep.

Vide a Bill of Exceptions in the King's-Bench, upon a Tryal at the Assises in Sam. Vernon's Case, in Brownlows Entries Latine Rediviv. f. 129. Where the Declaration, Plea, and Continuances are set forth, and then the Exceptions. A very useful Precedent.

De Termino Sci Hillarij, Anno Regni Domini Car. secundi, nunc Regis Angliæ, &c. 33 and 34.

Villa ff. Samuel Verdon Gen' und Cler', &c. [Here receite all the Pleadings and Continuances of the Record] Quiquidem separal' exit in formâ p̄d̄ inter partes p̄d̄ respective junct' postea scil't ad Assisas ten' apud Cast' Cant' in Com' p̄d̄ coram W. Montague Capitali Baron' Scaccarij dict' Dom' Regis & H. Windham, Mil' und Justic' dict' Dom' Regis de Banco Justic' Dom' Regis ad Assisas p̄d̄ p̄ro Com' capiend' assign' secundum formam Statut', &c. die Martis 14 die Martij Anno Regni dict' Dom' Regis nunc 34. ad triacon' deven' Ad quem diem coram Justic' p̄d̄ ven' tam p̄ræd̄ Sam. Verdon in propria per-

persona sua quod ꝓd̄ I. F. p Attorn̄ suum ꝓd̄ & Jur' Jurat' ill' impannellat' erat' similiter ven' & in Jur' ill' separat' exit' ꝓd̄ in forma ꝓd̄ respective junct' jurat' fuer.

Et super triatione ill' in forma ꝓd̄ habit' in manutentione ꝓd̄ exit' superius ult' junct' ꝓd̄ S. V. dedit in evident' Jur' sic impannellat' & Jurat' Quod, &c. [Here recite what he gave in Evidence,] Ac sup' inde Consiliarij ex pte ꝓd̄ I. F. interpolat' & instabant quod materia ꝓd̄ Jur' ꝓd̄ in Evidenc' sic ut ꝓfertur dat' non fuit sufficiens in Lege ad manutenend̄ exit' ꝓd̄ ex parte ꝓd̄ S. V. Et ea de causa petier' a Pl'at' Judice quod materia illa foret seperalit' compt' Nihilominus Justic' p̄dict' declarav' opinion' sua quod materia p̄dict' Jur' ꝓd̄ sic ut ꝓfertur in Evidenc' dat' fuit sufficien' in Lege ad manutenend̄ exit' ꝓd̄ ex pte ꝓd̄ S. V. si Jur' ill' crederent & invenirent q̄d̄, &c. Ac super inde Pl'at' Justic' p directiones suas secund̄ opinion' sua ꝓd̄ poluer' consideration' inde Jur' ꝓd̄ sup quo consiliarij Pl'at' I. F. conceper' quod p legem terre materie ꝓd̄ ex parte Pl'at' S. V. Jur' ꝓd̄ in Evidenc' sic ut ꝓfertur dat' (licet Jur' ill' crederent & invenirent q̄d̄, &c.) non fuer' in lege sufficien' ad manutenend̄ exit' ill' p ꝓd̄ S. V. Ideo poluer' exception' sua opinion' Justic' ꝓd̄ & petier' q̄d̄ Pl'at' Justic' opponerent mand' & sigill' sua huic bille secundum formam Statuti in hujusmodi casu edit' & provis' ac superinde Pl'at' H. Windham appoluit manus & sigilla sua avinde secund̄ formam Statuti ꝓd̄ dat' apud Castrum Cant' 14 die Martij Anno Regni dict' Dom̄ Regis nunc 35 H. Windham.

I. West-

1. West. 2. 31. 13 E. 1. When the Justices will not allow a Bill of Exception upon prayer, if the Party impleaded tender the same unto them in writing, and requires their Seals thereunto, they or one of them shall do it.

2. If the Exception sealed be not put into the Roll, upon Complaint thereof to the King, the Justice shall be sent for, and if he cannot deny the Seal, the Court shall proceed to Judgment according to the Exception.

This Bill of Exception is given by the Statute of Westm. 2. Cap. 31. before which Statute a Man might have had a Writ of Error; for Error in Law, either, in redditione Judicij, in redditione Executionis or in Processu, &c. which Error in Law must be apparent in the Record; or for Error in fait, by alledging matter out of the Record, as the death of either Party, &c. before Judgment. But the mischief was if either Party did offer any Exception, praying the Justices to allow it, and the Justices over-ruling it, so as it was never entred of Record, this the Party could not assign for Error, because it neither appeared within the Record, nor was any Error in fait, but in Law and so the Party grieved was without remedy until this Statute was.

This Act extendeth to all Courts, to all Actions, and to both Parties, and to those who come in their Places, as to the Vouchee, &c. who comes in loco tenentis.

It extendeth not only to all Pleas Dilatory and Peremptory, &c. to Prayers to be received, Oier, of any Record or Deed, and the like; but also to all Challenges of Jurors and any material Evidence given to any Jury, which by the Court is Over-ruled. 2 Inst. f. 427.

All the Justices ought to Seal the Bill of Exceptions, yet if one doth it, it is sufficient; if all refuse, it is a contempt in them all. And the Party grieved may have a Writ grounded upon this Statute, commanding them to put their Seals Juxta formam Statuti, & hoc sub periculo quod incumbit nullatenus omittatis.

The Party must pray the Justices to put their Seals; but if they deny it they may be commanded, and may do it after Judgment.

If the Party must be dead, his Heirs or Executors, &c. according to the Case, may have a Writ of Error upon this Bill of Exceptions. And no diminution can be alleged, for the Parties are confined to the matter in the Bill.

If the Justice dye before he acknowledgeth his Seal according to the Act, a Scire facias shall go to his Executor or Administrator, for the death of the Judge is the Act of God, which shall not prejudice the Party: as in the Case of a Certificate of the Marshal of the King's Host, that the Person outlawed was in the King's Service beyond Sea, in a Writ of Error a Scire facias shall go to the Marshal's Executor or Administrator upon shewing the Certificate.

If

If the Judge denyeth his Seal, the Party may prove it by Witnesses, ib.

Error of a Judgment at the Grand Sessions in the County of Pembroke, in an Assise of darrein Presentment, by Henry Cort, against the Bishop of St. Davids, Dorothy Owen and others, for the Church of Stackpool.

The fourth Error assigned was, because the Issue being, whether H. Cort did last present one R. D. the last Incumbent, who was Instituted and Inducted upon his Presentation: The Plaintiff offered in Evidence Letters of Institution, which appeared to be, and so mentions that they were sealed with the Seal of the Bishop of London, because the Bishop of St. Davids had not his Seal of Office there, and those Letters were made out of the Diocels; and the Defendant had demurred thereupon, That those Lettees were insufficient, and the Demurrer was denied, which Jones said was an Error, because they ought to have permitted the Demurrer, and should have adjudged upon it. But it was held, that the not admitting of the Demurrer ought not to be assigned for Error; for when upon the Evidence the matter was over-ruled by the Justices of Assise, that was a proper cause of a Bill of Exceptions, and the remedy which the Statute appoints in that Case; And for the matter of the Letters of Institution sealed with another Seal, and made out of the Diocels, it was held they were good enough, for the Seal is not material, it being an Act made of the Institution, and the Writing and Sealing

is

is but a Teſtimonial thereof, which may be under any Seal, or in any place. But of that point they would adviſe. Cro. 1 part 340.

The Party grieved may have a Writ of Error, and may aſſign Error upon that Bill ſealed, and alſo in the Record, or in one of them at his pleaſure. F. N. B. f. 21. N. Ex rigore juris, it need not be allowed in Arreſt of Judgment. 27 H. 8. in Tatum's Action upon the Caſe.

Note, This Bill is to prevent the precipitancy of the Judges, and ought to be allowed in all Courts, and in all places of Pleadings, and may be put in at any time before the Jury have given their Verdict.

But this Bill is rarely uſed, there being impar congreſſus, betwixt the Judge and the Counſel; and the prudence of the Judges induce them to find ſpecial Verdicts in Caſes of doubt and difficulty.

A Releaſe prayed at the Aſſiſes after Iſſue joyned.

Et pd Defend in propria perſona ſua ven & dic quod pd Juſtic' Dom' Regis hic ad caption' Jur' pcis inter ipſum Defend & pfat Quer' procedere non debent quia dic quod poſt vlt diem F. ult' pterit de quo die Jur' pfd inter partes pd continuat' fuit, & ante hunc diem [ſcilt diem de Aſſiſe] ſcilt primo die M. Anno, &c. apud, &c. pfd Quer' per nomen, &c. remiſit, relaxavit, &c. Et hoc, &c.

unde

unde per quod Juſtic' p̄d ad captionem Jur' p̄d ulterius procedere nolunt.

The death of one of the Defendants pleaded after the laſt Continuance.

Et p̄dict' Defendens per A. B. Attornatum ſuum ven' & p̄d T. non ven' & ſup hoc p̄dict' Defend' dic' quod poſt ult' continuationem placiti p̄d ſcilt poſt xv Paſche ult' p̄terit' de quo die loquela p̄dict' ult' continuat' fuit hic uſque ad diem ſcilicet in Craſtino Sc̄e Trinitat' tunc prox' ſequen' & ante eundem diem ſcilt decimo die Maii ult' p̄terit' p̄dict' T. apud A. p̄dict' obiit. Et per quod null' proceſs nec aliquid aliud in placito p̄dict' ulterius verſus p̄fat' T. fiat & quia p̄d I. & K. hoc non dedic' Ideo null' proceſs nec aliquid aliud in placito p̄d verſus p̄fat' T. fiat, &c.

A Baron challengeth the Pannel becauſe no Knight was returned of the ſame.

Et ſuper hoc idem T. calumpniat arraiament' pannelli p̄dict' quia dic' quod ipſe eſt & tempore arraiament' pannelli illius fuit Baro hujus Regni Anglie locum & vocem habens in quol' Parliamento hujus Regni quodque in eodem pannello nullus Miles nominat' & record' exiſtit Et hoc p̄tus eſt verificare unde petit Judicium & quod pannellum illud caſſetur, &c.

Evidence, and Demurrer upon Evidence, Pidleton againſt Baker. Cro. Eliz. 42. f. 751.

In Ejectment, It was held by all the Court upon Evidence to a Jury, That if the Plaintiff give in Evidence any matter in Writing or Record, or a Sentence in the Spiritual Court, (as it was in this Caſe) and the Defendant offers to demur thereupon, the Plaintiff ought to joyn in the Demurrer, or waive the Evidence, becauſe the Defendant ſhall not be compelled to put matter of difficulty to lay Gens, and becauſe there cannot be any variance of a matter in Writing. But if either Party offer to demur upon any Evidence given by Witneſs, the other, unleſs he pleaſeth, ſhall not be compelled to joyn, becauſe the credit of the teſtimony is to be examined by a Jury, and the Evidence is incertain, and may be enforced more or leſs; but both Parties may agree to joyn in Demurrer upon ſuch Evidence. And in the Queens Caſe, the other Party may not demur upon Evidence ſhewn in Writing or Record, for the Queen, unleſs the Queens Counſel will thereto aſſent; but the Court in ſuch caſe ſhall charge the Jury to find the matter ſpecially, as appears 34 H. 8. Dyer 53. But this is by Prerogative. Vide Lib. 4. 104. the ſame Caſe, and 1 Inſt. 72. Where my Lord Cook ſays, If the Plaintiff in Evidence ſhew any matter of Record, or Deeds, or Writings, or any Sentence in the Eccleſiaſtical

ſtaſtical Court, or other matter of Evidence by Teſtimony of Witneſſes, or otherwiſe, whereupon doubt in Law ariſeth, and the Defendant offer to demur in Law thereupon, the Plaintiff cannot refuſe to joyn in Demurrer, no more than in a Demurrer upon a Count, Replication, &c. and ſo e Converſo, may the Plaintiff demur in Law, upon the Evidence of the Defendant, but the Kings Counſel ſhall not be enforced to joyn in Demurrer; but in that caſe the Court may direct the Jury to find the ſpecial matter. So that the ſeveral ſorts of Evidence make no difference, as to the joyning in Demurrer. 1 Part Leon. 206.

Joynder in Demurrer.

Darroſe againſt Newbott. Cro. 4 Car. f. 143.

In Error of a Judgment in Bridgwater: The Error aſſigned was, for that, in an Action upon the Caſe ſur Aſſumpſit, the Parties being at Iſſue, a Demurrer was joyned upon the Evidence, and thereupon the Jury diſcharged, and afterwards Judgment was given for the Plaintiff, and a Writ of Inquiry of Damages awarded, and Damages found, and Judgment thereupon; where the Jurors which came to find the Iſſue, although by the Demurrer they were diſcharged of the Iſſue, yet ought to have aſſeſſed Damages conditionally, if Judgment ſhould be given for the Plaintiff. And in proof thereof was cited Newis and Scholaſtica's Caſe, Plo. Com. f. 408. and the old Book of Entries, &c. And it was ſaid by

by the Court, if theſe Precedents be good Law, then it may be enquired of by the ſame Jury conditionally: But it may be as well inquired of by a Writ of Inquiry of damages, when the Demurrer is determined, and the moſt uſual courſe is, when there is a Demurrer upon Evidence, to diſcharge the Jury without more inquiry. But as my Lord Chief Baron Montague held at the Aſſiſes in Cambridgſhire, 1682. it may be one way or other.

Note, He that demurs upon Evidence, admits the Evidence to be true.

In the Aſſiſe by R. Newis and Scholaſtica his Wife, againſt Lark and Hunt, which was taken by default. The Precedent in Plowd. Com. as to this matter runs thus,

Recogn Aſſiſe ꝓ̄ exacti venerunt qui ad veritatem de ꝓmiſſis dicend electi triati & jurati fuerunt ſuper quo Willielmus Benlows Serviens ad legem de conſilio ꝓdictorum R. & Scholaſtice in manutentione Aſſiſe ꝓdict coram Juſtic Dom̄ Reg̃ de Banc hic in evident Recognit Aſſiſe ꝓ̄ dixit quod diu ante diem impetrationis Aſſiſe ꝓ̄ quidam H. Clark fuit ſeiſitus, &c. Et condidit teſtamentum & ultimam voluntatem ſua in ſcriptis inter alia unde pars inde in hiis Anglicis verbis ſequitur videlicet [Alſo this is the laſt Will and Teſtament of me the ſaid Henry Clark, for and concerning, &c.] Et ulterius idem Serviens ad legem ex parte ꝓ̄ R. & S. dedit in evident ejuſd Recognit quod &c. Quorum ꝓtextu idem jam Serviens ad legem exigit quod iidem Recogn Aſſiſe ꝓ̄ Aſſiſam ꝓ̄ de tenementis ꝓdict cum per-

tinū in vilu, &c. p pte ipsorum R. & S. tri-
ari & comparere debeant, &c. Et quiet sund
dare debent qō pō W. Lark & J. Hunt dcos
R. & S. de tenemtis pō cum ptinū in vilu, &c.
disseisiverant, &c.

Et pō W. Lark & J. H. in propriis per-
sonis suis dic' qō evident & allegation pdict
ex parte pō R. & S. superius allegat minus
sufficien in lege existunt ad manutenend
Assisam pō ad quos ipse necesse non habet
nec p legem terre tenetur respondere unde
pro defectu sufficient Evident in hac parte
pet Judicium quod Juratores pō de veredicto
suo in premissis dicend eronerentur, &c. Et
quod pō R. M. & S. ad Assisa sua pō habend
pcludantur, &c.

Et pō R. & S. dicunt quod ex quo ipsi suf-
ficien materiam in manutentione Assise pō
in Evident recognit pō ostend quam quidem
materiam pō W. Lark & J. Hunt non dedi-
cunt nec ad eam aliqualit respond petunt Ju-
dicium Et quod iidem Jurator' inde erone-
rentur, & quod pō W. & J. de Assisa illa con-
vicantur, &c. Super quo dict est Recogn pō
quod inquir' que dampna pred R. & S. sustin-
nuer tam occasione disseisine pdict quam pre-
missis & custagiis suis per ipsos circa lectam
suam in hac parte appositt si contingt Judi-
cium p iisdem R. & S. in placito pred sup
evidentias pdict reddi Qui quidem Recogn
dicunt sup sacram suum quod si contingt Ju-
dicium in placito pō p pō R. & S. super Evi-
dentias pdict reddi, iidem R. & S. sustinuer
dampna occasione disseisine pred ad 13 s. 4 d.
& pro missis & custagiis suis ad 20 s. Et quia

Justi-

Justiciarij hic se advisare volunt de & sup̃ p̃missis p̃riusquam judicium inde reddant, dies datus est partibus p̃dict', &c.

Note, several Exceptions were taken to the manner of giving the Evidence; First, for that the intire Will was not shewed, but part, and that this being the foundation of the Evidence, the whole Will ought to have been shewed; for there might be some other matter of substance, as a Condition, Limitation, &c. in the parts not shewed. But all the Justices disallowed this Exception, and said, the Party in any Title or Bar, needs shew no more than what makes for him. As in an Act of Parliament, in which are divers branches, 'tis sufficient to shew that branch which serves ones purpose, and not like the Case of a Fine or Recovery of twenty Acres, where I must shew the whole Record, although I am concerned but in one Acre, because the Original is intire, and so is the Record grounded upon it. See also Fulmerston and Steward's Case, Plo. Com. 102. Another Exception was, That the Fine was not shewed under the Seal of the Court, or the great Seal, but one part indented of the Chirography was only shewn, which the Jurors were not bound to believe, because it wanted a Seal. But all the Justices were against this, and said, the Jury might find the Fine of their own knowledge, without the shewing of the Parties, or they might find it upon the credit of any Witness that had seen it, and the shewing the part indented, is the usual Evidence of

a Fine. (Note, a Fine indented and not exemplified under Seal, &c. shall not be delivered to the Jury, 34 H. 6. 25.) And they said, because it is only the Inducement of the verity to the Jurors, the Party could not demur upon this; for the effect of the matter is, that there is such a Fine which is amongst the Records: And this is the substance of the matter, and the part of the Chirograph is nothing but the Image of the verity, and therefore there could be no Demurrer upon this.

Another Exception was, That the Recovery was not shewed under Seal, or at least that the Roll of this ought to be alledged certainly; but all the Court (except Harper) answered, That upon the general Issue, the Jury might find things that proved or disproved the seisin or disseisin, be they matters of Record or otherwise, and the Jury could not give a rightful Verdict, if they could not find them, and whatsoever they may take conusance of themselves, may be given in Evidence by words, or copies, or other argument of the truth. 'Tis true, in pleading, a Man cannot make a Title by Record, without shewing the same under the Great Seal, and if a Record be pleaded in Bar, a day may be given to bring in the Record under the Great Seal; but such day cannot be given to bring in the Record upon Evidence, but the finding of it by the Jury is sufficient, and they may find it of themselves, although it be not shewed them in Evidence. But perhaps they shall not be bound upon pain of Attaint to find it, if it

Stiles 22. *White* and *Pindars* Case.

be not shewed them under Seal; but nevertheless they may find it, and they do well, if it be true. And by the same reason that they may find it, they may take Instruction of it by any circumstance, which induceth the truth. (Note if it be not necessary to shew the Record, and the Jury may find it without; yet 'tis not fit to be permitted to prove it in such a manner, without shewing the Record, or a true Copy of it.) And the Demurrer upon Evidence goes to the Law upon the matter, and not to the verity, which is admitted, and the effect in Law is denyed, for if the Party will not confess the truth of the matter given in Evidence, then he ought so to say, and put it to the Jury to be tryed, and if they find this, where it is false, an Attaint lies; but a Demurrer upon Evidence never denies the truth of the Fact, but confesses the Fact and denies the Law to be with the Party which shews the Fact.

Vide *Rolls* Tit. Tryal 687.

As to a fourth Exception, for want of alledging and averring that H. Clark, had not any other Issue Male than John and F. (upon a Limitation of a Remainder for want of Issue Male of H. C. and a title made to the Plaintiffs Wife, under that Limitation;) The same Judges answered, that which the Plaintiffs gave in Evidence, is to the intent to perswade the Jury, that they have a good Title, and what they say shall be applied as they intended; and as by presumption no man will say any thing against himself, so it lies on the other side to shew what is against him; and although in Pleading, cer-

tainty ought to be shewed, (to which the o
ther Party must answer, and upon which the
Court may judge,) yet in Evidence, so great
and exact certainty is not requisite, for the
Jury may found their Verdict, (if the mat-
ter be ambiguous) upon what is most pro-
bable, and by the same reason that which is
most probable, is good Evidence, and there-
fore it shall be intended that H. C. had no
other Issue Male, because the other Party
did not shew that he had.

The Precedent of a Demurrer upon E-
vidence in Reniger and Fogassa's Case, in
Plowd. Com. f. 1. In an Information upon
a Seizure of Woad Imported, the Custom
not being paid, nor any agreement mad
with the Collector in the Exchequer, whet
the Issue was, whether the Defendant mad
an Agreement with the Collector of the Sub-
sidies for the Woad, according to the Act, &c
or not.

Ideo fiat inde inquis ac pro eo quod idem
A. Fogassa est Alien natus videlt apud Ci
vitatem portus Portugalie in Portugalia su
obedientia pō Portugalie Regis petit me
dietatem lingue sue, &c. A. B. C. P. R
S. &c. qui ad veritatem de premissis dicen
electi triati & jurati dictus A. F. in manu
tentione exitus pō superius ad patr' juncti
ad probandū exit ilt pro parte ipsius A. for
verum produxit pred Tho. Wells Collect
Custom & Subsidō Domini Regis in port
ville Southampton ac J. S. adtunc & adhu
Clericum sive servient ipsius Tho. Wells in
dicto Offic Collect pō nec non quendam J
D

D. Yeoman ad testificand' p̄missa in placito ipsius A. spec' fore vera. Qui quidem Tho. Wells examinatus sup sacram suum coram Baronibus hic p̄fatum in p̄missis dicit quod &c. [Here recite the Evidence.]

Et p̄d Attorn' Dom̄i Regis p̄ eod' Dom̄o Rege dic' quod evidencie p̄d' supius dat' minus sufficien' in lege existunt ad manutenend' seu p̄band' exit' p̄o parte ipsius A. F. superius ad patriam junct' unde ob insufficient' earundem evident' ac ex quo p̄ evidencias illas non dedicitur forisfactura bonorum p̄d' in informatione p̄d' spec' idem Attorn' Dom̄i Regis p̄ ipso Dom̄o Rege petit Judicium ac quod eadem bona remaneant Domino Regi forisfacta juxta formam Statuti p̄d' Et p̄d' A. F. dic' quod evidencie p̄fat' superius ex parte ipsius A. F. dat' sufficien' in lege existunt tam ad manutenend' q̄ p̄band' exit' p̄d' p̄ parte dicti A. F. supius ad patriam junct' quam ad excludend' Dom̄m Regem de aliqua forisfactura bonor' p̄fat' habend' Ad quas p̄d' Attorn' Domini Regis p̄ ipso Dom̄o Rege minus sufficienter respondit nec aliquod p̄o ipso Rege allegavit unde idem A. pet' Judicium ac quod p̄d' bona in dicta informatione spec' ei reliberentur quodq; ipse quoad p̄missa ab hac Curia dimittatur. Jdeo ad Judicium.

Note, In this Case, the Agrément according to the Statute, was put in Issue generally, and yet the special Agrément maintained the Issue.

Regula. And whereſoever the Evidence doth not warrant, prove and maintain the very ſame thing that is in Iſſue, that Evidence is defective, and may be demurred upon.

Non eſt factum. Upon Non eſt factum to a Bond dated at York: It was ſaid in this Caſe, that to prove the Bond made in another place, doth not prove the Bond nor warrant the Iſſue, becauſe the delivery is intended to be where the Date is; but the Witneſſes cannot prove the contrary, and ſo the Iſſue is not proved. But ſurely if this be found, the Plaintiff ſhall have Judgment as well as upon a Bond delivered before the date. 31 H. 6. Pla. 7. Rolls 677. But infancy or made by Dures, cannot be given in Evidence upon non eſt factum, Lib. 5. Whelpdale's Caſe, 119. becauſe thereby the Bond is not void but only voidable; otherwiſe of the Bond of a Feme Covert, or Monk, for there the Bond is void, and ſo Non eſt factum; and ſo of a Bond made to a Feme Cover, and the Huſband diſagree to it, or by Huſband and Feme, Non eſt factum of the Wife.

Releaſe. In An Aſſiſe if the Tenant plead, Nul tort, Nul diſſeiſin, he cannot give in Evidence a Releaſe after the Diſſeiſin; but a Releaſe before the Diſſeiſin he may, for then there is no Diſſeiſin upon the matter.

Warranty. In a Writ of Right, if the Tenant joyn the Miſe upon the meer Right, he cannot give in Evidence a Collateral Warranty, for he hath not any right by it, and therefore it ought to have been pleaded, 1 Inſt. 283.

Re-

Regularly, whatsoever is done by force of a Warrant or Authority, ought to be pleaded. Regula:

But Note, In all Cases where one cannot have advantage of the special matter, by way of Plea, there he may have advantage of it in Evidence; as for Example, the Rule of Law is, That one cannot justifie the Death or killing of a Man; and therefore if one kill another in his own defence, he cannot plead this specially; but he may give this in Evidence: and so in defence of his House against Thieves and Robbers, &c.

By the Statute 23 H. 8. Cap. 5: any thing done by the Authority of the Commission of Sewers, may be given in Evidence upon the general Issue. Sewers.

After taking the General Issue, the Defendant cannot give in Evidence any thing that goes in discharge of the Action; as in Debt upon Nil Debet, he cannot give in Evidence a Release, nor a Grant to cut Trees, to repair upon nul waste fait, nor making of a Ditch to amend the Meadow: but that he only lopped the Trees, he may, if waste be assigned in succidendo Arbores, &c. Neither if a Statute was made that all Tenants for Life should be dispunishable of waste, could he give in Evidence this Statute, 28 H. 8. Dyer 28. for the Discharge ought to be pleaded, because it admits a cause of Action without it. Regula. Release. Waste. Statute.

In Debt against Executors, and Assets Inter manus, in Issue, 'tis good Evidence that they sold Land, by the Will of the Testator, &c. and that they had the Money paid, so that they recovered Damages in Trespass for Assets.

for Goods taken in the Life of the Testator, &c. 3 H. 6. 3.

Villenage. In an Issue upon Villenage regardant to a Manor, a Villain in gross is no Evidence. Dyer 48.

Attornment. In Wast by the Grantee of a Reversion, by Montague and Fitz. the Lessee may plead that he in Reversion ne granta pas per le fait, and give in Evidence, that he never attorned, or he may Traverse the Attornment at his election, Dyer 31.

Trespass. In Trespass, Quare clausum fregit, the Defendant says, that locus in quo, &c. is 6 Acres in D. which is his Freehold: the Plaintiff replies, that it is his Freehold and not the Defendants; the Defendant cannot give in Evidence, other 6 Acres in D. which are his Freehold, because the Plea shall be intended to refer to the 6 Acres of the Plaintiffs, Dyer 23.

Rescous. In Rescous by the Lord, upon Not Guilty, the Defendant shall not give in Evidence That he doth not hold; by Vavasour and Bryan; and so if he says nothing is behind in

Avowry. Avowry, he shall not give in Evidence that he doth not hold of him. T. 9 H. 7. 3.

Feoffment. In Assise, Feoffment pleaded, the Plaintiff said he did not enfeoff modo & forma upon the deed and Letter of Attorny to Infeoff upon condition found, if the Attorny made it without condition, this well proves the Issue for the Plaintiff. 13 E. 4. 4.

If one plead a Feoffment Joyntment with his Companion, or of a Feme Covert, the other may say ne enfeoffa pas, and give the matter in Evidence, and the Court shall instruct the Jury of the Law. 18 E. 4. 29.

Upon

Upon the general Iſſue, any thing may be given in Evidence, which proves the Plaintiff had no cauſe of Action. Regula.

Treſpaſs by the Warden of the Fleet, upon Not Guilty, you may give in Evidence, that he is not Warden, 4 E. 4. 7. Treſpaſs.

So in Treſpaſs of a Houſe, that he had no Houſe there, or the Freehold of another, and not of the Plaintiff, is good Evidence upon Not Guilty: but in Treſpaſs of Goods, 'tis no good Plea to ſay, the property was in another, although it is in a Replevin; and therefore it ſeems to be no good Evidence in Treſpaſs, becauſe poſſeſſion maintains the Action againſt all but the Owner; but that the property was in a Stranger, and he gave them to the Defendant, is good. See before Cap. Evidence, 27 H. 8. 25. But in Trover that they were not the Goods of the Plaintiff is good Evidence. 5 H. 7. 3. Trover:

Ceſſavit and Count, that of divers Lands held by entire Service, upon non tenuit modo & forma, held by ſeveral ſervices, is good Evidence, for he had no ſuch cauſe of Action 10 H. 7. 24. Ceſſavit.

Upon the general Iſſue, for the Defendant by Evidence to convey to himſelf the ſame Intereſt and Title, is good Evidence. Regula:

As in Treſpaſs of Goſhawks, Not Guilty, and Evidence, that he had a Leaſe of that Wood for years where they were taken, is good, for it is his Title. Treſpaſs.

Account of Receipt, by the hands of J. S. the Defendant pleads ne unques ſon Receiver, and Evidence that J. S. gave this to him, is good Account.

good, 2 H. 4. 13. So in Treſpaſs a Leaſe for years, Tenancy at ſufferance (but not at Will,) that they were a Strangers Goods, who gave them to the Defendant, is good Evidence, upon Not Guilty. 22 Aſſ. 73. becauſe by theſe matters he makes himſelf a Title, & ſic de cæteris.

Regula. Upon the general Iſſue, if by the Evidence the Defendant acknowledge that he did the wrong, and juſtifie this, and gives matter that goes to diſcharge him of the Act by juſtification, this Evidence is not good, but he ought to have pleaded it.

This Rule is demonſtrated by thoſe Caſes where upon Not Guilty, in Treſpaſs, the Defendant would ſay the Property was in a Stranger, and that by his commandment, or his Servant, he took the Goods. Not Guilty, and that he did the Battery ſe defendendo. Not Guilty in maintenance, and lawful maintenance. Inſufficiency of Pounds. The Freehold of a Stranger, and his Licence. A former Recovery in another Action. So for Common, Rent-ſervice, Rent-charge, Licence, &c. cannot be given in Evidence upon the general Iſſue; for theſe matters in Evidence are Juſtifications, which go in diſcharge of the Party, but not by Title, but by juſtification.

So where an Impriſonment or Entry is given by authority of Law, or by authority from any Party, as for an Impriſonment, by the Statute Treſpaſſers in Parks, putting a Man off his Ground, thruſting a Man out of Church that troubles the Congregation in Service, parting an Affray, and keeping

ing

ing the quarrellers apart, in defence of himself or his. Entry in perambulation. Entry to amend his Gutter leadinng to his House, as of ancient time had been used. That it was a Common Inn. That he put in his Cattel by the Plaintiffs agreement. That he entred and took the Emblements after the death of the Tenant for Life. That the Plaintiff owed him Money, and by his invitation he went into his House to receive it. That he took the Goods as a Harriot, Waif, Estray, or Wreck. Or the Plaintiff took away the Defendants Cattel and he entred into the Close where they were, and took them again. That he took the Cattel damage feasant in his Ground, or for an Amercement in a Leet, &c. That the Goods were the Goods of J. S. who delivered them to the Plaintiff to keep, and J. S. commanded the Defendant to take them; or excuse it, that the Plaintiff delivered them to him. That he took them by a Writ. That as Schoolmaster he gave moderate Correction. These are excuses and justifications without Title, and therefore must be pleaded and cannot be given in Evidence upon Not Guilty.

So in an Action de malefactoribus in parcis, he cannot plead Not Guilty, and give a Licence in Evidence. So in an Appeal, if he plead Not Guilty, and shews that he was Sheriff, and executed his Office, or that he was Forester, and killed him because he fled, and would not submit. Vide 12 H. 8. f. 1. The best Case of this matter.

Evi-

Regula. Evidence which is contrary to that in Issue or which is not agreeable to the matter in Issue is not good.

As appears by several Cases, which you may find in the Chapter of Evidence. As upon the Issue, nothing passes by the Deed you cannot give in Evidence, that it is not your Deed, for this is contrary to the Issue and to that which is acknowledged in the by implication. 5 H. 4. f. 2.

And so upon Not Guilty, in Assault and Battery, and Evidence that it was done in his own defence, is not good.

And so in Debt upon a Bail-Bond, you must plead, That there is not the Name of Sheriff in it, Et issint nient son fait, and can not give in Evidence upon non est factum, for it is contrariant, 5 E. 4, 5.

So upon Issue of Common appendant Common pur cause de vicinage, is not agreeable to the matter in Issue, and therefore can not be given in Evidence, 13 H. 7. 13.

Where the Evidence proves the effect and Regula. substance of the Issue, it is good.

As to prove a Grant or Lease pleaded simplement, a Grant or Lease upon condition, and the condition executed, is good, for this proves the effect and substance of the Issue, 14 H. 8. 20. So a promise to the Wife and the Husbands Agreement proves a promise to the Husband, and this you may see Other Cases. of Evidence, in many Cases, in the Chapter Evidence.

In Trespass for Goods taken, the De- Trespass. fendant, upon Not Guilty, in mitigation of Damages, may give in Evidence, That

the Plaintiff had his Goods again, 11 H. 4. 24. 19 H. 6. 34. Maintenance.

Justifiable maintenance cannot be given in Evidence upon the general Issue, but must be pleaded. The Master may justifie for his Servant. Any Man for his Kindred, &c. or to give Mony to the Poor, &c. But that he was of his Counsel, may be given in Evidence upon the general Issue, for to give Counsel, is not maintenance. 22 H. 6. 35. 28 H. 8. 6.

Upon this Issue, the Defendant may give in Evidence, that he is a Lay-Man not lettered, and that it was read to him in another form, 15 E. 4. 18. but it is the best way to plead it, for the understanding of the Jury. 39 H. 6. 9. Bro. Waiver 2. *Non est factum.*

In an Issue upon a Prescription Traversed, the Plaintiff gave in Evidence a Deed bearing date after the time of limitation, scil. after the time of R. 1. And the Defendant would have demurred in Law upon it, and well he might per Cur. Whereupon the Plaintiff would not give this in Evidence, but gave other Evidence 34 H. 6. 37. See Chapter Evidence, where a Grant shall be taken as a confirmation of a Prescription. A Witness may prove the contents of a Deed or Will. *Vaughans* Rep. 77. Prescription.

Note, The Opinion, 12 H. 4. 21. That a Deed made before the time of memory, may be given in Evidence, although it cannot be pleaded. Antient Deeds.

Upon Not Guilty, the Defendant gave in Evidence, That by the Plaintiffs Agreement he carried him from D. to S. and held good, because, what is done by the Plaintiffs Agreement, is no Imprisonment, 14 H. 6. 2. False Imprisonment.

Upon

Upon Not Guilty, the Defendant ſaid his Maſter locked the Plaintiff into a Chamber of his Houſe, and gave the Defendant, being his Servant, the Key to keep, 22 E. 4. 45.

Sow pigged being taken in Diſtreſs.

Vide Repl. in Fitz. 34. Repl. of a Sow and Piggs, the Defendant juſtified for the Sow, and to the Piggs, pleaded he did not take them; the Jury found, that the Sow was with Pigg, when ſhe was taken, and after caſt her Piggs in the Cuſtody of the Defendant, and the Plaintiff recovered Damages: For ſays Bro. Abridg. Tit. General Iſſue, 88. This is a ſpecial taking in Law.

Dower.

Dower of Rent. Hill. ne unque ſeiſe que Dower la, &c. Horton J. S. granted the Rent to the Huſband, payable at Michaelmas next, and the Husband dyed before the day, and ſo he was ſeized in Law, and demanded Judgment. Thirn. You ſhall ſay generally, quod ſeiſie que Dower la, &c. and give your Caſe in Evidence, Et ſic bene, notwithſtanding the doubt of the lay Gens, for they ought to credit the Law, and Evidence is not to be pleaded. 11 H. 4. 88.

Emblements. Knivet's Caſe. Lib. 5. 85.

Tenant for Life, leaſeth for years, who is ouſted, and the Tenant for Life is diſſeiſed: The diſſeiſor leaſeth for years, who ſows the Land; the Tenant for Life dies; he in Remainder in Fee brings Treſpaſs againſt the Defendants claiming the Emblements by the Leſſee of the Diſſeiſor. Adjudged, that they had not the meer right, but in reſpect of their poſſeſſion, they ſhould bar the Plaintiff, who had no right; and that the meer

meer right was in the Leſſee of the Tenant for Life, and that he might bring Treſpaſs againſt the Leſſee of the Diſſeiſor, and recover all the mean profits. But as to the Entry into the Land to take the Emblements, this was good matter of juſtification: but in regard it was not pleaded, it could not be given in Evidence upon Not Guilty; and therefore the Plaintiff had Judgment for the Entry, and was barred for the reſpue. Note, that the Leſſee of Tenant for Life had right to the Land, and by conſequence to the Emblements, as things annexed to the Land, and the death of the Tenant for Life determines his Intereſt to the Land, but his right to the Emblements remains.

It ſufficeth to prove the ſubſtance, without any preciſe regard to the Circumſtance. As if an Indictment be, That with a Dagger the Offender gave another a mortal Wound, &c. And in Evidence it proved to be done with a Sword, Rapier, Club, Bill, or any other Weapon, the Offender upon this Evidence ought to be found Guilty; for the Mortal Wound is the ſubſtance, and the manner of the Weapon is but the circumſtance; yet ſome Weapon ought to be mentioned in the Indictment. And ſo if A. B. and C. be Indicted for Killing of J. S. and that A. ſtruck and the other were abetters; to prove that B. ſtruck is ſufficient, &c. Regula. Subſtance. Circumſtance.

Manſlaughter upon an Indictment muſt be found, if proved, becauſe the killing is ſubſtance, upon which Judgment ſhall be given.

Indictments for Murther of Ministers of Justice, in execution of their Office, may be general, viz. That the Prisoners felonice, voluntarie & ex malitia sua præcogitata, &c. percusserunt, &c. without alledging the special matter which may be given in Evidence, for the Law implies Malice prepensed. So if a Thief in robbing kills the Man that resists him, or a Man is killed without any provocation, or without malice prepensed that can be actually proved, the Law adjudges this Murther, and implies the Malice; and in these Cases, the Offenders may be indicted generally, That they killed of Malice prepense, for the Malice implied by Law, given in Evidence, is sufficient to maintain the general Indictment, Lib. 9. 67. Mackalley's Case.

So of an Indictment as accessary to two to prove accessary to one, is sufficient, Lib. 9. 119.

In Cromwel's Case, Lib. 4. 12. Although it was objected that in an Action of Slander, If the Defendant will justifie, he must justifie the same words and in the same sense, as is laid in the Mar. or else he must plead Not Guilty, and give the special matter, that is the variance in Evidence. Yet the Court held, That the Defendant should not be put to the general Issue, but might justifie, although he varied from the Plaintiff in the sense and quality of the words; and might set forth the coherent words. As for calling the Plaintiff Murderer, the Defendant may shew that they were speaking of Hares, and the words were spoken in reference to killing of Hares.

Upon

Upon the Iſſue, if the Lord of the Mannor granted the Lands, per copiam rotulorum Curiæ manerii præd. ſecundum conſuetudinem manerii præd. To prove that there were cuſtomary Lands in the Mannor, and that the Lord of late granted the Land, &c. Per. Copiam Rotulor. Curiæ, where it was never granted by Copy before, is no good Evidence to find the Cuſtom, or that the Lands, &c. were grantable or demiſeable by Cuſtom. Leon. 55. Kemp and Carter's Caſe.

Copyhold. In *Pilkington's* Caſe, *Stiles* 450. *Rolls* ſaid, If Copies of Court Roll be ſhewed to prove a Cuſtomary Eſtate, the enjoyment of ſuch Eſtates muſt alſo be proved, otherwiſe the Proof is not good.

Forger of a Deed, in which is contained a demiſe of the Site of the Mannor of R. and terras dominicales, &c. A deed of the Site and all the demeſnes of the ſaid Mannor, exceptis duabus cluſuris, &c. is good Evidence, for it is not neceſſary to conſtrue terras dominicales, &c. omnes terras dominicales, &c. for Lands not accepted are terræ dominicales, and ſo the Court is ſatisfied by that Evidence, Leon. 139. Atkins and Hale's Caſe.

Forger. *Totum & pars.*

Debt againſt an Executor, upon plene adminiſtravit, it appeared that the Executor medled and adminiſtred, and then refuſed in Court, and Adminiſtration was granted to another; and that ſeveral Sums were recovered againſt the Adminiſtrator; it was ſaid by Periam Juſtice, 1. That if an Adminiſtrator (who is a Stranger) adminiſter, without the commandment of the Executor, the Executor cannot give ſuch Adminiſtration in Evidence to prove his Iſſue. 2. That in the principal Caſe, the Executor having adminiſtred he could not refuſe, and ſo the Adminiſtration is granted without cauſe, and what he did was without Warrant,

Plene adminiſtravit.

Upon *Plene adminiſtravit* a Retainer may be given in Evidence.

and no Adminiſtration. Leon. 134. Hawkins and Lawſe Cale. At Bury Aſſiſes, 1682. before Judge Windham, The Executor gave the Adminiſtration of the Adminiſtrator in Evidence, and allowed; but there, what the Adminiſtrator did, was by the Executors Conſent. In Pr. Lun and his Mothers Cale.

Plene adminiſtravit. An Executor pleads *plene adminiſtravit præter* a Judgment, Replication, and Iſſue, that the Judgment was fraudulent. The Obligee who had the Judgment was denied to have Evidence about his Debt, for he ſweareth to have Aſſets for himſelf, and is intereſſed in the thing. Before Judge *Windham*; at *Bedford* Aſſiſes, 1682.

An Executor de ſon tort cannot give in Evidence his retaining of Goods to pay himſelf, for he cannot retain; but if he take out Letters of Adminiſtration (although) Pendente lite, he may retain for a debt of as high a nature, and plead this in Bar, for the Adminiſtration purges his wrong, and although he ſhall not abate the Writ by taking out Letters of Adminiſtration, yet he may plead this in Bar. Stiles Reports, 338.

No Evidence to be given againſt what is admitted upon the Record.

In a Replevin, the taking was ſuppoſed in R. The Defendant ſaid that the place where, is forty Acres, parcel of the Manor of R. which is his Freehold, and avowed for damage feſant; The Plaintiff ſaid, that the place where, is parcel of the Manor of R. in R. and conveyed title to himſelf in that; Abſque hoc, that the Manor of R. unde, was the Freehold of the Defendant. It was the Opinion of the Juſtices, that the Plaintiff is eſtopped to give Evidence that the Defendant had not any Manor of R. for the words

words absque hoc and unde imply he had such a Manor, but he ought to have taken it by protestation, that the Defendant had no such Manor of R. in R. absque hoc, that the forty Acres was the Freehold of the Defendant, Dyer 183.

Trespass, concerning the Rectory of Norton Pinckney, which belongs to Oriel College in Oxford. The Issue was, if there was a Vicaridge indowed there, or only a stipendary Curate.

Note, *Leon.* 3: *part* 210. If the Parties admit a thing *per nient dedire*, the Jury is not bound by it; but where upon the pleading a special matter is confessed, the Jury shall be bound by it. Impropriation

1. All agreed, that if a Vicaridge be erected and established, if there was no Endowment de facto of the Vicaridge, the Vicar could not claim any thing

2. There was shewed an Impropriation, by the Licence of the Pope, made in the time of E. 2. Dodridge said, that was not good. Jones, e contra. And it will be perilous to such ancient Impropriations, if now the consent of the King must be shewed; and at that time it was taken good by the assent of the Pope without the King. Doderidge denyed that the Pope without the King at that time could make an Impropriation with the Ordinary and Patron. But Crew agreed with Jones. And in things of such antiquity omnia præsumuntur solempniter acta, and said that so it was ruled in a Case before: And Jones said, it was nothing to the Vicar, for the Vicaridge may be endowed without the consent of the King, and 'tis not Mortmain. Palmers Reports 427. Erasmus Copes Case against Bedford.

Hors de ſon Fee. Where hors de ſon fee is pleaded, a Releaſe of the Seigniory, is good Evidence. 8 E. 2. 262.

Debt for Rent In debt for Rent upon a Leaſe for years, The Iſſue being joyned, if the Rent was paid or not, the Defendant gave in Evidence for part of the Rent, That the Plaintiff was by Covenant to repair the Houſe, and did it not, and thereupon he expended the Rent in repairing the Houſe, and the Queſtion was, if this Evidence will maintain the Iſſue. Gaudy conceived it did, for the Law giveth this liberty to the Leſſee to expend the Rent in Reparations, and recoup the Rent, V. 12 H. 8. 1. Fitz. Tit. Bar. 242. 14 H. 4. 27. Fenner, It is no Evidence, for if the Leſſor will not repair it, the Leſſee may have his Covenant againſt him. Clench, ſeemed he might well expend the Rent in Reparations, but he ought to have pleaded it, and cannot give it in Evidence upon the general Iſſue, and thereupon they moved the Jury to find the ſpecial matter.

So that it ſeemed to the Juſtices, That the Defendant had liberty to expend the Rent in the Reparations (they being to be done at the Plaintiffs Coſt) but then that he ought to have pleaded this matter, as it was done in (almoſt) the like Caſe. Fitz. Tit. Bar. 242. Yet why might he not give it in Evidence upon the general Iſſue? for if the Law allows this to amount to a payment of the Rent, then the Defendant owes nothing, which maintains Nil debet, and I think the other Book of 14 H. 4. 27. rejects this ſort of ſpecial Plea, upon this reaſon, that the

Plea

Plea amounted to a general Iſſue: but there indeed the Rent was pleaded to be laid out at the Plaintiffs command, here only by authority in Law. I ſhould be glad if any one would reconcile theſe two Books better. I know there is another reaſon in the Book (and aſſigned by Rolls in his Abridgment of the Caſe) why the Plea was rejected, viz. That the duty was acknowledged by the Plea, and therefore the matter of the Plea not good, without ſhewing a Deed of it; but I ſhould have been better pleaſed with him, if he had aſſigned the other reaſon, viz. That it amounted to the general Iſſue. Which made Cheyne that he durſt not joyn in Demurrer. For 'tis not pretended in either Caſe, that the deed ordered the Rent to be laid out in the Repairs.

And in that Caſe in F. where there was no expreſs Order of the Plaintiff; it may be the Judges allowed the ſpecial matter to be pleaded, becauſe the Jury ſhould not be entruſted with the Law upon the general Iſſue, which may be ſaid for the ſpecial pleading this matter in our Caſe, although it may amount to the general Iſſue.

Reparations.

But as to the reſidue, the Defendant ſhewed, he paid it to others, by the Plaintiffs Order, which was held clearly good, for what is paid by the Leſſors appointment, is a payment to himſelf. Cro. Eliz. 223. Taylor againſt Beal. Vide Rolls Tit. Debt 605. 34 H. 6. 17. Bro. Debt 27.

Vide the Caſes of *Recouper. Lib.* 5. 30.

Eſtoppel.

Where a Man is Eſtopped in pleading to ſpeak againſt his own Deed, yet he ſhall not in Evidence; as in Iſcham's Caſe againſt

Morris. Cro. 4 Car. 109. Upon Evidence at Bar, It was held by all the Justices of the Common-Pleas, That where one makes a Lease for years of Land by Indenture, and hath nothing in the Land, and afterwards purchaseth the Land and aliens it; although it be a good Lease for Years by Estoppel against him and his Alienee, by way of pleading, and shall bind them, yet it shall not bind the Jury, but they may find the truth, and if they find the truth, the Court shall adjudge it to be a void Lease. Vide tamen Rawlin's Case, Lib. 4. 53. Sutton and Dicken's Case, Leon. 1 Part, f. 206. 1 Inst. 47. 227. Edwards against Qmellhallum. Marsh. 64. James and Landon's Case, Cro. 27. Eliz. f. 36. Leon. 3 part, 210. Bulst. 2 part, 41.

Demurrer. Note, That if a Demurrer be made upon the Evidence, the Evidence ought to be entred verbatim. Kelway 77. Where in Account, against one generally as Bayliff, the Evidence that charged him specially by reason of his Tenure to collect, &c. was upon Demurrer held not good.

Surplusage. Matter of surplusage shewed in Evidence shall not hurt. Keilway 166.

Will. Issue was upon a devise to A. Harding and her Heirs, modo & forma, and the Will given in Evidence was, A. H. shall have all my Inheritance, if the Law will allow it, and held sufficient to maintain the Issue, Hob. 2. So upon Ne unques receiver per maines J. S. a delivery from J.D. by the appointment of J.S. to the Plaintiffs use, is good Evidence Hob. 36.

Account.

Issue

Iſſue whether A. was taken by a Capias ad ſat. at the Suit of B. and Evidence of a taking at the ſuit of C. and then a delivery of a Capias ad ſat. at the Suit of B. to the Sheriff, is good. Hob. 55. But a taking upon a Capias utlagat. or Capias pro fine, with a prayer of the Plaintiff, that he may remain for his ſatisfaction, is not. Ibid. Arreſt.

In a Conſimili caſu, where the demandant counts of an alienation in Fee, yet the Defendant ſhall make his Traverſe to the alienation, modo & forma, and then the demandant ſhall maintain the Iſſue, by an Alienation in Fee, or in Tayl, or for Life for they are all alike material. Hob. 105. *Conſimili caſu.* Subſtance.

In an Aſſiſe the Defendant pleaded the Deed of the Brother of the Plaintiff, with Warranty, a Deed of the Father with Warranty, will not maintain the Defendant's Iſſue. Hob. 55. Warranty.

In Bennet's Caſe, Stiles 223. In a Tryal at Bar, It was ſaid by the Court, That if either of the Parties to a Tryal deſire that a Juror may give Evidence of ſome things of his own knowledge to the reſt of the Jurors, that the Court will examine him openly in Court upon his Oath, and he ought not to be examined in private by his Companions. And it was alſo ſaid, That if a Robbery be done in Crepuſculo, the Hundred ſhall not be charged; but if it be done by clear day-light, whether it be before Sun riſe, or after Sun ſet, it is all one, and the Hundred ſhall be charged. Juror. Robbery.

In

Demurrer upon Evidence.

In an Action on the Case, for digging a Hole in the High-way, into which his Gelding fell, &c. Upon Not Guilty, this Evidence was given, That the Plaintiffs Servant was driving the Plaintiffs Gelding in the way, and that by reason of the hole he fell &c. Upon which it was demurred, because it was not proved that there was such a High-way, nor who digged the hole. Roll Chief Justice, That Evidence is no more than a special Verdict, and it ought to find the way and the Hole digged, and all the matter conducing to the Issue, and therefore it is not good as it is, and a Venire de novo was awarded. Stiles 335.

Action sur Case.

Demurrer upon Evidence.

In Trover and Conversion, there was a Demurrer joyned upon the Evidence, and thereupon the Court directed the Jury to find Damages for the Plaintiff, if upon the argument of the Demurrer, the Law should be adjudged for him, and then the Parties desired the Jury might be discharged, and referred the matter to the Judges, to determine the Law upon the Evidence. In this Case Roll Justice took this difference: If a Record be pleaded, it must be sub pede sigilli, or else the Judges cannot judge of it, but it may be given in Evidence, and the Jury may find it, though it be not sub pede sigilli. And the Court advised the Parties for their own expedition to let a Venire facias de novo be issued out, and to wave the Demurrer upon the Evidence, because it was not good, nor could not bring the matter in question before them, that they might determine it; for one Party saith there is a Writ, and the other saith

Record.

saith there is not a Writ, which is bare matter of Fact for the Jury to determine, and not for the Court, and the Demurrer ought to have been, whether the Writ be good or bad, and should have admitted that there was a Writ tiel quel; and then had the whole matter come legally before the Court, to wit, whether the Evidence given to the Jury be sufficient for them to find a Verdict for the Plaintiff, upon the Issue joyned or not. For the matter of fact ought to be agreed in a Demurrer to an Evidence, otherwise the Court cannot proceed upon the Demurrer. And he said, if a Deed be pleaded, the Party must shew it in Court; but in Evidence, 'tis not absolutely necessary to shew it, if it can otherwise be proved to the Jury, and so it is of a Record: and concluded, that the Demurrer was not good, and that there ought to be a Venire facias de novo to try the matter again. Bacon Justice said, there ought to be a Venire facias de novo, but that Judgment ought to be given against one Party, to wit, the Defendant, for ill joyning in the Demurrer, to the intent the Party that is not in fault may be dismissed; and the Parties here have waved the Tryal per Pais, by joyning in the Demurrer. But Roll answered, That no Judgment at all could be given, for both parties be in fault, one by tendring the Demurrer, and the other by joyning in it, and the Defendant might have chosen whether he would have joyned or not, but might have prayed the Judgment of the Court, whether he ought to joyn. The Court advised to search Precedents, for a Venire facias

Deed.

Record.

cias de novo after a Demurrer upon an Evidence, and if there be any, they hold that the ſame Jury ought to come again, and not another. Roll ſaid, if a ſpecial Verdict be found inſufficient, a new Venire facias ought to Iſſue, and he ſaw no difference, between that and this Caſe, Wright and Pinder's Caſe, Sitles 22. and 34.

Debt, Servants. Wages.

In Debt for Servants Wages, viz. 20s. or a Robe yearly: the Defendant may pleaq payment of the Robe, and ſhall not be put to the general Iſſue, where the payment is of another thing than Mony; but of Mony he muſt plead nil debet, and give the payment in Evidence. And the Defendant may plead that the Plaintiff departed out of his Service, and ſhall not be forced to the general Iſſue, 9E. 4. 36. Though ſurely that may be given in Evidence upon Nil debet, for the Plaintiff muſt prove he ſerved: ſo indebitatus Aſſumpſit & non Aſſumpſit, upon the promiſe in Law, an Extinguiſhment by taking a Bond (being a matter of a higher nature) for the Debt may be given in Evidence.

Extinguiſhment.

And Note, if an Infant buy Goods, and afterwards give a Bond, and this Bond be avoided by Infancy, yet it ſeems the Contract ſhall not be revived. Sed dubitatur, Rolls Tit. Extinguiſhment 604. For now, this Bond which was voidable, is become void, and a void thing ſhall not have ſuch effect: But a perſonal Action once ſuſpended is gone for ever; but acceptance of a Bond ſhall not extinguiſh Rent, nor Arrearages of an Account, before an Auditor of Record, becauſe theſe are of a higher nature than the Bond

Bond, the Rent being real, and the other of Record. But the Bond extinguishes the Contract for the Arrearages upon an Insimul computassent, &c.

Acceptance of Rent due the last day, and an Acquittance thereof, discharges all the arrearages due before. Lib. 3. 65. Unity of possession in as high an Estate destroys the prescription, &c. Acceptance. Rent.

A seisure and condemnation in the Exchequer of forfeited Goods, may be given in Evidence upon Not Guilty in Trover, but it must be pleaded in Trespass. In Trover of a Horse, that he is a Common Hostler, and that the Horse was put to him at Livery and dyed, is good upon Not Guilty. Roll 1 part, 22. Trover. Trespass: *Vide Rolls* 1 part, 1, 2. A custom pleaded in Trover to take Corn to repair a Bridge, and *Cro. Eliz.* 433. and 262.

Upon Assumpsit, the Plaintiff declares upon two considerations, and a simple promise: If the Jury find but one, or a conditional promise, this doth not maintain the Issue for the Plaintiff. Leon. 173. Musted and Hopper's Case. Promise.

Where the Issue is not perfect, no Evidence can be applied, neither can the Justices of Nisi prius proceed to the Tryal of such an Issue. As whether the Mony the paid after the date of the Obligation, and the date was left out and did not appear in the Record. Brown 2. 47. Imperfect. Issue.

In Debt upon a Bond, conditioned to pay 20 s. at the House of the Defendant, the 7th day of May, upon payment at the time and place. The Jury found the payment before the seventh day, and prayed the advice of the Court, if this was a payment Payment.

at

at the day. The Court adjudged that the payment and acceptance before the day, was as well as if it had been paid at the day, Savil's Reports 96. Bond against Richardson. And so says Cook 1 Institutes 212. The time and place are but circumstances, and if the Obligee or Feoffee receive the Mony at another place, or before the day, it is sufficient: or a lesser sum before the day. But More 47. Upon Issue of payment at the day and place, and Evidence of payment a Month before, and Demurrer upon the Evidence, Dyer Brown and Welsh, said this Evidence doth not maintain the Issue, because before the day of payment there is no duty, and the day and place are parcel of the Issue, and the Act on one day is not an Act done on another day: As if an Executor pleads payment at the day, 'tis not good Evidence to shew that it was paid before the day by the Testator, for this doth not prove the Issue, and yet there was not any duty remaining at the day, and therefore the Pleading ought to have been specially according to the truth. Vide devant 198. And 'tis not like the Case, where the circumstances of time and place are put only for necessity of Tryal; but in regard that payment is the substance, why is it not sufficient to prove, as well as to find, the effect and substance of the Issue? And 'tis not like the Case of collateral Conditions, where the condition is not to pay Mony, but to do some collateral thing, as to deliver a Hostle, a Robe or Ring, &c. or to pay Mony to a Stranger, such collateral Conditions are more strictly to be observ'd. Vid. 1 Inst. 212.

Note,

Note, If there be a Demurrer, yet there may be a Plea, puis darrein continuance; and if the Plaintiff take Iſſue, or demur to this Plea, yet the Court muſt alſo conſider of the firſt Demurrer; for if upon that ſtanding confeſſed by the Demurrer, the Plaintiff could not have his Action, the Court cannot give Judgment for him, howſoever the latter Iſſue or Demurrer paſs. But otherwiſe if the firſt had been an Iſſue, for then nothing were confeſſed to his prejudice, and then that had been utterly relinquiſhed, by a ſecond Iſſue, or Demurrer, Hob. 18. with a Quere, &c. When this Plea is pleaded, the Juſtices of Niſi prius cannot proceed to take the Inqueſt, neither can the Plaintiff reply there, but in Bank. Bulſtr. 92, 93. *Pleas puis darrein continuance.*

Per Dodridge, In Trover and Converſion of Goods, if the Defendant derive a Title from a Stranger, this amounts to the general Iſſue, otherwiſe if from the Plaintiff. Latch. 186. And baylment of the Goods to deliver to another, and delivery accordingly amounts to the general Iſſue, and may be given in Evidence upon it. Bulſtr 3. part, 209. Trover.

In Treſpaſs againſt two, for entring into the Plaintiffs Land, if one pleads his Freehold, and the other that he entred by the commandment of him that pleads it is his Freehold, here is to be but one Iſſue joyned, viz. by him that claims the Intereſt, for upon the Iſſue all depends: If it be found againſt him, his Servant has no colour. Treſpaſs. Freehold.

Ann

Averment. And in regard what may be averred, may be proved and given in Evidence, 'twill not be impertinent to draw a short Scheme of Averments, with which I will conclude.

Averment had upon or against a Deed. To alter, qualifie, or abridge the operation of it, if there be any apt words in the Deed, whereupon to ground it. As a Grant to A. the Son of B. and he hath two Sons of that name, of the Manor of S. and he hath two Manors of that name, which Son or Manor was intended may be averred. And so may a

Consideration. consideration of a Deed that is besides, but not that is against the express consideration of the Deed, nor can any thing against the words of the Deed, either inlarge or restrain it.

Uses. Nor can a Use against or besides the express Uses in the Deed; but where no Use is expressed, or incertainly expressed, it may; and also to reconcile a Fine, and the Indentures to lead the Uses of the Fine. Lib. 2. 75.

But when a Deed is utterly incertain, no averment shall help it. As a Grant to one of the Sons of J.S. to two & hæredibus, &c.

Upon or against a Record. An Estate to a Woman for her Life, may be averred to be made for her Joynture. Dyer 146. Lib. 4. 4. And that the thing granted to me by a new Name is all one thing with that which hath another, or an old Name. Dyer 37. 44.

A thing that is against or besides a Record, or any thing that is within it, shall not be averred; therefore the date of a Recognizance expressed to be taken at Dale cannot be averred to be taken at Sale. But such an averment as may stand with the Record may be admitted. As that the Fine was be-

fore

fore the Inrollment (being both in one Term,) the Uſes of a Fine or common Recovery may be averred; or what, or who was meant, where there are two of a name, &c. Lib. 8. 155. The Heir in Tayl cannot aver againſt a Fine levyed by his Anceſtors, That Partes finis nihil habuerunt, Lib. 3. 84, 85. Leon. 75, 76, &c. But when Tenant in Tayl accepts of a Fine, and grants and renders the Land by the ſame Fine, which is executory, there, if no Execution be ſued in the Life of Tenant in Tayl, his Iſſue may aver continuance of Poſſeſſion, &c. in his Father, for this ſtands with the Fine, and the acceptance of the Fine alters not the Eſtate.

A Fine taken by *R. M.* Eſq; and returned by *R. M. Militem*, upon the *Ded p.* the Record not to be averred againſt in Error. *Telverton* 33 *Cre.* 2 *part* 11.

If a Man and his Wife ſell her Land for Mony, and after levy a Fine to the Vendee, and his Heirs, it may be averred it was for Mony, and ſo carry the Uſe to the Vendee, without any Declaration of Uſe, which otherwiſe would reſult to the Woman and her Heirs: and ſo other Uſes may be proved, than what are in an Inventure of Uſes ſubſequent to the Conveyance, &c. Lib. 9. 8. 5 26.

Tenant in Tayl, with remainder in Tayl to A. Reverſion in Fee to himſelf, bargains and ſells Land, &c. and levies a Fine to him with Proclamation, with general Warranty. The Conuſee infeoffs A.

Reſolved the Bargainee had an Eſtate determinable upon the death of the Tenant in Tayl (and alſo the Reverſion in Fee, which the Bargainor had,) and his Wife ſhall be endowed, but this determines upon the death of the Tenant in Tail.

Resolved, The Fine doth not discontinue the remainder, for this doth not pass any Estate, but this Estate of the Bargainee is durable, &c. so that it shall not determine, until the Tenant in Tayl dye without Issue: and the conclusion may be confessed and avoided.

Resolved, That Warranty doth not bar the remainder, for this was annexed to the Fee determinable, &c. and to the Reversion in fee, and doth not extend to the remainder, for the Conusee cannot inlarge, &c. 'Tis a Maxim, that a Warranty bars no Freehold, which is in esse, possession or remainder, &c. and not displaced before or at the time of the Warranty, although it be divested before the descent.

Resolved, A Warranty cannot inlarge the Estate.

Resolved, The Feoffment of the Conusee was not a discontinuance of the remainder, because he was not Tenant in Tayl; so of the Grantee of totum statum suum, &c.

Resolved, A Collateral Warranty may be given in Evidence, and found by the Jury.

The Chief Justice held that by the Feoffment of the Conusee, the remainder was not displaced nor put to a right, for his Fee-simple, and his Fee determinate pass, and the Feoffment which in it self is not tortious, cannot be tortious to another. Otherwise it is when Tenant for Life, or remainder in Tayl, &c. makes a Feoffment, for the Feoffment it self is tortious.

Note,

Note, There are some Titles, to which a Warranty doth not extend, as in the Case of an Exchange, condition upon a Mortmain, consent to a Ravisher, &c. for in these Cases no Action lies, in which Voucher or Rebutter may be, neither shall a descent take away Entry in these Cases, and cannot be displaced out of their original essence. Collateral Warranty shall bar Dower, and yet an Action is given for this. But a Fine, &c. and five years bar these Titles and Dower also, if an Action be not brought in time, Seymour's Case. Lib. 10. 96.

Buckler and Harvey's Case, Lib. 2. 55.

Tenant for Life Leases for four years, and afterwards grants the Tenements Hab. from P. for Life, after P. the Lessee attorns, then the Grantee enters and Leases at will, to which Tenant at will the Tenant for Life levies a Fine Come ceo, &c. Rem. in Fee enters.

Resolved, The Grant was void, for an Estate of Freehold cannot commence in futuro, and the Grant being void at the Commencement, the Attornment afterwards cannot make it pass; and that the Grantee was a disseisor. But if the Grant had been good at the Commencement, and was only to have its perfection by a subsequent act; as by Livery upon a Charter of Feoffment, &c. and the Grantee enter before the perfection, he is not a Disseisor, but a Tenant at Will.

Resolved also, If the Fine had been Levied to the Disseisor himself Come ceo, &c. he which had the right of remainder, may enter for the forfeiture, for it was agreed;

that the right of a particular Estate may be forfeited, and entry given to him who had but a right. As if Lessee for years be ousted, or Tenant for Life disseised, and the Lessee for years brings an Assise, or the Lessee for Life a Writ of right, &c. 'tis a forfeiture.

Resolved also, That the fine being levied to the Tenant at will, it is a forfeiture, and he which had right of remainder may enter, and the Tenants for Life and at will also, shall be estopped to say quod partes finis nihil hab. &c. and of such estoppels which are by matter of Record, and trench to the disherison of them in Reversion, &c. they shall take advantage although they are strangers to the Record, for they are privies in Estate.

Resolved also, If the Disseisee levy a Fine to an Estranger, the Disseisor shall retain for ever; for the Disseisee against his own Fine cannot claim the Land, and the Conusee cannot enter, for the right of the Conusor cannot be transferred to him; but by the Fine the right is extinct, whereof the Disseisor shall have advantage. But in Crok 1. part 482. 13 Car. it was moved, if the Disseisee, not knowing of the Disseisin, levied a Fine to a Stranger, whether that should bar his right, and move to the benefit of the disseisor, according to Buckler's Case; and said, if admitted, would be of very mischievous consequence, and by two Judges held, that it should not enure to the benefit of the Disseisor but to the use of the Counsor himself, for otherwise a Disseisin being

secret,

ſecret, may be the cauſe of diſherſon of any one who intends to levy a Fine for his own benefit, for aſſurance of his Lands upon his Wife and Children, or otherwiſe. 1 Inſt. 277.

Not againſt ſuch Certificates as are a definitive Tryal of the thing certified, as the Biſhops Certificate of Excommunication, Baſtardy, lawful Marriage, &c. So Certificates of the Marſhal of the Hoſt, which is a Tryal; but againſt Certificates only of information it may be: as againſt Certificates upon Commiſſion out of any Court, or of the Commiſſioners that affirm a Man a Bankrupt, which are not tryable in a courſe of Law, but Informations. Lib. 7. 14. Lib. 8. 121. Againſt a Certificate.

So of a return, if it is a definitive Tryal of the thing returned, no averment lyeth againſt it. As the return of a Sheriff upon ſome Writs, as a Writ of Partition, Elegit and of Hab. Corp. from a Mayor, &c. But if the return is not definitive, as upon a Reſcouſe, &c. an averment doth lye, and upon this you may go to Tryal: So if be a return to indanger a mans Life, or his Inheritance, an averment may be had againſt it. Dyer 348. 117. So it lyeth againſt the returns of Bayliffs of Franchiſes, ſo that the Lords be not prejudiced in their Franchiſes thereby. Goldsb. 139, 129. pl. 23. Upon a Return.

In Action for a falſe return, an averment doth lye againſt the Sheriffs return, Winch 100. and ſo it doth in any other Action, than in that the return was made.

Any averment may be upon a Will or any part of it that may help to expound it, and of ſuch a thing that may ſtand with the Will, Upon or againſt a Will or Adminiſtration, it lyeth although they be under Seal of Court.

and may be collected out of the words. As which Son he meant, &c. Lib. 8. 31. 41. But no averment against or besides that which is expressed in the Will, or which cannot be gathered to be the mind from the words, nor of any thing that doth not cohere with the Will: especially if it be about Lands, as in the Lord Cheyney's Case, Lib. 5. 68. A devise to A. and the Heirs of his Body, the remainder to B. and the Heirs Male of his Body, on condition that he or they or any of them should not alien, &c. no averment shall be taken to prove by Witnesses or other Evidence, that the Devisor intended to include A. within this condition by the words he or they; for the construction of Wills ought to be collected out of the words of the Will in writing, and not by any averment or proof out of it.

Against Court Rolls, or upon them.

It lyes against the Rolls or Records of County Courts, Hundred Courts, Courts Baron. As that there is no such Record, or it is not as it is certified. 34 H. 6. 42. 9 E. 4. 4.

Against common presumption or reason.

No averment or proof is to be admitted against common presumption, as that there was more Rent behind when the acquittance of the last Rent was made. 1 Inst. 373. Nor against common Reason, as that Land doth belong to Land, or to a Messuage. Plo. 170. Lib. 4. 37.

Upon an award.

If the matter contained in an award, and the matter in the submission do not agree, it will hardly be supplied by an averment. Dyer 242. 52.

Date.

If the Defeasance of a Recognizance be dated before the Recognizance, it may be aver-

averred to be delivered at or before the time of the Recognizance entred into. Perkin's Case 147.

Things apparent or necessarily intendable by Law, need not be averred, manifesta non probatione indigent; Quod constat clare, non debet verificari. Lib. 11. 25. Plo. 8.

Chief Justice Anderson held, Godbolt. 131. that if one devise Lands to the Heirs of J.S. and the Clerk writes it to J. S. and his Heirs, that the same may be holpen by averment, because the intent of the Devisor is written, and more, and it shall be naught for that which was against his Will, and good for the residue. But if a Devise be to J. S. and his Heirs, and it is written but to the Heirs of J. S. there an averment shall not make it good to J. S. because it is not in writing, which the Law requires; and so an averment to take away any surplusage is good, but not to increase that which is defective in the Will of the Testator. But with submission, if the Law should admit of such averments, it would be as mischievous one way as the other, and no Man could know by the words of the Will, what construction to make, nor what advice to give, but this shall be controled by collateral averments out of the Will, and instead of proving the Testators Will, it would be the destroying of it. Divise.

If the partition be by Writ, although it be unequal, yet it shall not be avoided by averment, but shall bind the Feme Coverts. And such averment against the return of the Sheriff shall not be good. 1 Inst. 171. Partition.

Conſideration. A valuable Conſideration in a Bargain and Sale not expreſſed, may be averred. 2 Inſt. 672.

A conſideration which conſiſts with the Deed, and not repugnant, may be averred, as in a Bargain and Sale, if a particular conſideration be expreſſed, and the general Clauſe, of other good Cauſes and Conſiderations, or without that general Clauſe, yet other conſiderations may be ſhewed: So if the particular Conſideration be Love and Affection, yet payment of Mony may be ſhewed: So a precedent intent of Uſes and to levy a Fine may be ſhewed to guide the Uſe of the Fine. Rolls Tit. Uſes. 790.

Uſes. As if I Covenant by Deed to purchaſe Land, and then to levy a Fine, or make a Feoffment thereof to the uſe of another, and afterwards purchaſe and levy a Fine, or make a Feoffment, this uſe ſhall riſe; for the Deed is an Evidence of the precedent intent, and the uſes of a Fine or Feoffment may be directed by the precedent intent, and yet ſuch intent, is countermandable. But a Covenant to purchaſe and ſtand ſeiſed of Lands to uſes, ſhall not raiſe the uſe after the purchaſe, becauſe the uſe is to riſe by the Deed, and at the time when the Deed was made, there was no Eſtate in the Land. Ibid.

So if one joynt-tenant covenant to ſtand ſeiſed of his Companions part, if he ſurvive, yet no uſe ſhall riſe, if he did ſurvive, becauſe at the time of the Covenant he could not grant nor charge the Land. Ibid.

Fine ſur grant & render. 'Tis true that a fine ſur grant and render, unleſs it be in ſpecial Caſes, cannot be averred

red by Parol to be to any other use or intent than what is expressed in the Fine, Feoffment, or other Conveyance: But there is a diversity betwixt a Use and Consideration; for when a Fine, Feoffment, or other Conveyance import an express Consideration, a Man may aver, by word, another consideration, which may stand with the Consideration expressed; but the Parties cannot by Parol aver any other Use than is contained in the same Conveyance. Also no averment shall be against the Consideration expressed: But yet in some Cases a Fine Sur Grant & Render, may be ruled and directed in part by averment per parol: and this is when the Original Bargain and Contract betwixt the Parties, is by Indenture or other Deed; as where it is agreed by Indenture, that a Fine shall be levied of certain Lands, by the name of a certain number of Acres, to divers persons, and that they shall grant and render the Land again in Fee-simple, which shall be to certain Uses, the Fine is levyed of the Land; but there is some variance betwixt the number of Acres compriled in the Fine; or the Fine is levyed to one of the Parties only, who grants and renders the Land, so that there is a variance betwixt the Covenant and the Fine, either in the number, time or person, &c. Yet this Fine shall be averred to be to the Uses in the Indentures. For the intent of the Parties, and the substance and effect of their Original Bargain and Agreement, is chiefly to be regarded in all Conveyances, and therefore the Law allows an averment by parol, to reconcile the Fine and

Ju-

Indentures, although this sort of Fine imports a Consideration in it self, and regularly by a naked averment by parol, cannot be averred to be to any other use or intent than is comprised in the Fine it self, but by Deed it may be. Lib. 2. 77.

And although a Fine be of so high a nature, that it will not permit naked averments against the purport and conusance of the Fine; yet when the Law requires one of necessity, and for conformity to joyn with another in a Fine, the Law permits to shew the verity of the matter, to avoid prejudice and confusion. As where Baron and Fine an Infant levy a Fine, which is reversed for the Nonage of the Wife, the Baron and Feme shall have restitution presently, and the Conusee shall not detain this during the Coverture; for all the Estate passes from the Feme, and the Baron joyns for necessity and conformity and therefore the Law permits that the verity of this shall be shewed, and that the whole Estate shall be restored to the Wife during the Life of the Husband. Worsely and his Wife against Charnock. 30 and 31 Eliz. Lib. 2. 77.

What may be averred contra & præter Records, Fines, Recoveries Deeds, Wills, &c. is very requisite for a good Evidence to be ready in, and therefore I have here given this taste; referring him to the Books at large, where he may see what averments he in remainder, the Heir in Tayl, the Wife, her Heirs, Estrangers, Privies, Parties, &c. may have to Fines, Recoveries, &c. Lib. 1. 76. Lib. 2. 77. Lib. 4. 71. Lib. 9. 140. 141.

Lib.

Lib. 8. 55. Lib. 2. 88. Lib. 10. 50, 96. Lib. 3. 51, 88. Lib. 4. 74, &c.

In Aſſault and Battery, if the Plaintiff prove only the Aſſault, he ſhall recover, for an Action of Treſpaſs lyes for an Aſſault, of an Aſſault and Battery, Aſſault and menace, &c. See Rolls Tit. Treſpaſs, 545. F. N. B. 91. 2. &c. Aſſault. Battery.

To lay hands gently upon the ſhoulders of a man and ſay that is He againſt whom the Juſtices Warrant is: or to ſerve him with a Subpœna, proves no Battery.

Theſe things following are good juſtifications, but cannot be given in Evidence upon the general Iſſue.

Correction by the Parties, Maſter, Schoolmiſtreſs, Apprehenſion of a common Cheater at Dice. Molliter manus impoſuit, upon one ſetting a Dog upon him. Beating one by the Husband in defence of his Wife. By the Maſter in defence of his Servant; or by the Servant in defence of his Maſter. Holding a Man that cometh to ſtop the River to his Mill; or to throw down his Booth. Inevitably diſcharging his Musket in the Plaintiffs Face at a Muſter. Beating one in defence of his poſſeſſion of his Goods, Houſe, Lands, Goods diſtrayned, &c. By a Forreſter, of one who reſiſted in the Forreſt, That he impriſoned another to prevent miſchief. As the killing of another with whom he was fighting, (not wrangling with words) until the fury be over.

Lunacy will not excuſe in Battery, although it will of Felony. Note a Man may juſtifie an Aſſault and Battery, but not wounding or maiming of life or member, or mayheim in defence of the Poſſeſſion of his Lands or Goods. 2. *Inſt.* 316.

An erroneous Proceſs to an Officer out of a Court, having Juriſdiction, in aid of the Bayliffs. That the Executor entred the Plain-

Tenant in common cannot justifie to enter into his Companions. Ground to take the Horse they have in Common, although he may take him elsewhere.

Plaintiffs Ground to take the Testators Timber there. That he had a Piscary, and put Stakes in the soil. Taking his Goods stolen, in the Plaintiffs House, upon fresh pursuit. Entring his Soil to throw down a Nusance. Or to take my Cattel, which the Plaintiff put in his Ground. To throw down the Plaintiffs House on Fire, next mine. Breaking his Windows or House, to get out, where he imprisoned me. To take a handful of Grain out of his heap, who took one out of mine, and threw it into his. To carry away his Grain or Pony which he threw into my heap. To chase his Cattel with a Dog out of my Ground, Damage feisant. To throw that into the Plaintiffs Ground which he threw into mine. That my Cattel took a mouthful, &c. of his Grass passing in the way I had over his ground, against my will. Throwing Goods into the Thames, out of a Barge to save the Lives of the Passengers. To fetch out of the Plaintiffs Ground, the Trees he granted me. To dig his Ground to mend my Pipe there. That I hunted Cattel out of my Ground with a Dog which against my will run into his Ground, I rating and recalling him. A Prescription to cut Grass in the Plaintiffs Ground, lying nigh the Church, to estrow the Church, being but an easement.

Distress by a Stranger as Bayliff, and the assent of the Party. By the command of the Chief Justice, Order of Chancery, &c. Rolls Tit. Trespass. 559. That the Plaintiff ought to Impale against a Forest, and for default of Pales, the Beasts went in, and the Forester fetched them out.

These are justifications and excuses that must be pleaded, and cannot be given in Evidence upon Not Guilty, unless it be in mitigation of Damages.

Trespass lies for Goods stolen, although the Thief be Convicted of Felony. Latch. 144. Markhams Case, and so I knew my Lord Hales held, although in Rolls Tit. Trespass 537. 'tis said, if it appears on the Evidence that it was Felony, Trespass lies not. Which I think is not Law. Trespass. Felony.

A man who sows the Lands to halves with the Owner, or three agree to sow the Land, where two of them have no Interest, and a Stranger takes the Corn, they cannot joyn in Trespass, having no interest but an Agreement, but the Owner only must bring the Trespass. Cro. 3. part, 143. Goldsb. 77. Sows to halves.

Upon reversing an Outlawry, the Party is restored, and may have Trespass; but upon reversal of a Judgment the Party shall only be restored to the Pony for which the Sheriff sold his Term, upon a Fieri fac. Cro. 3 part, 270. Outlawry reversed.

Upon Not Guilty in Trespass, Quare clausum fregit, at the Tryal the Defendant shall not say, that the Plaintiff is Tenant in Common; he should have pleaded this, and hath now lost this advantage; and if the Jury find it, their finding is not material. Cro. 3 part, 554. Tenancy in Common. Where Tenants in Common shall joyn in an action and wherenot, and what actionsthe one shall have against the other. See 1 *Inst.* 197, 200. *&c.*

A Man sells all his Woods standing, growing, &c. upon the Premisses, to hold during the Life of the Vendor, rendring Rent; the Vendee cuts down all the Trees: if he cuts Wood afterwards growing in the same place, the Vendor may have Trespass. Leon. 3 part, 7. Woods.

If a Carrier lose Goods, a special Action of the

Trover against a Carrier.

the Case lies against him, but not Trover, Rolls Abr. 6. so of a common Carrier by Boat. Noy. 114.

Copyholder.

Trespass lyes for a Copyholder against the Lord for cutting down Trees, that he the Tenant ought to have for repairs. Godbolt 173.

Estray.

By seisure of an Estray, the Lord hath but the Custody and not the Property, and therefore if he works the Horse, Trespass lyes. Yelverton 96. 97

Continuando.

Trespass with a continuando, cannot be for taking a Horse, nor ten Trees &c. nor without a re-entry of the disseised, unless his re-entry be taken away by the Act of God, or the Estate be determined so as he cannot enter, as if Tenant pur auter vie be disseised, and cestuy que vie dye, for there his entry is taken away by the Act of God, otherwise if it be taken by his own act, as if he release to the disseisor, &c. 19 H. 6. 28.

Parco fracto. Park. Warren.

Upon non cul. No Park by Prescription or Grant is good Evidence. 18 H. 6. 22.

General Trespass for breaking his Park, and taking his Deer, &c. doth not ly at Common Law, but a Writ is given by the Statute West. 1. cap. 20. So if A. have a free Warren in the Soil of B. A. shall not have Trespass, but case for entring the Warren and stopping the holes, &c.

Commoner. False Imprisonment.

A Commoner cannot have Trespass for the Grass. After a Supersedeas shewed to the Bayliffs, false imprisonment lyes against them, not against the Sheriff; so against the Bayliff of a Franchise, if he take other Mens Goods in execution upon the Sheriffs Warrant, not against the Sheriff, nor against the Party, unless he procure the Bayliff to take the wrong.

Possession.

He that hath the Freehold in Law, unless he hath actual possession cannot have Trespass. Therefore the Heir cannot have Trespass against the

the abater, nor against Tenant at sufferance before he hath entred, and only from that time: But an Executor or Administrator shall, by relation, have Trespass from the death of the Intestate, &c. But a disseisee after entry shall have an action for all mean Trespasses from the disseisin, even against Strangers, for he is restored to the possession ab initio. Relation.

Trespass cannot be maintained against him who comes by the Goods lawfully, as by the Plaintiffs delivery, or under that, or by act in Law, &c. but Detinue. But Trespass lies against Tenant at will, or him that I lend my Goods to, who destroys them; for thereby the privity is determined. It lyes against a Miller for taking Toll where none is due; for taking my Servant out of my service; for rescuing one taken at my suit out of the Bayliffs hands, for the Bayliff is my Servant. For beating my Wife or Servant per quod, &c. Not against him that J. S. sells my House to, or has my Goods from the Sheriff, although the Sheriff took them wrongfully. It lies for hunting a Fox, &c. in my Ground. Against Church-wardens, who act by the Justices of the Peace's Warrant, if the Warrant be not good. Trespass.

For digging so near my ground that it fell into the Defendants pit; But not that my House fell into the pit, for 'twas my fault to build so near another mans ground: For entring my ground, to take out his Falcon, which flew thither after Game. For killing my Tumbler in his Warren.

Although I sell the goods, it lyes for a Trespass done before. Tender of sufficient amends before the action brought, is a good Bar, for a negligent Trespass, not for a voluntary one. Time. Bar.

If

Ab initio. If a man enter inter into a place by authority of Law, and abuse this authority, he is a Trespasser ab initio, for his first entry shall be intended for this purpose. As if the Lessor enter to view Waste, and stay all night. If the Kings Purveyor sells my goods. If the Searcher abuses my Stuff. If a man will stay in a Tavern all night. If he detains a distress after amends tendred before impounding. If a Bayliff refuse Bayl Trespass doth not lye against him ab initio, but case; for the Sheriff or under-Sheriff, not he, ought to take Bail; not against the Party nor Bayliff, or person in aid, if the Sheriff doth not return his Writ of Latitat, or makes a false return; but it doth against the Sheriff: So of an Officer of an Inferior Court.

If the Lord work an Estray, Distress, &c. D[illegible] Executors find a Bond and cancel it, thinking it was discharged and it was not; they are Trespassers ab initio, although they came lawfully to the possession at first. Rolls Tit. Trespass 563.

Lunatick. The Lunatick (and not the person to whom he is committed) must bring the action in his name for a Trespass done in the Land. Brownl. 1 part, 157.

The knowledge of Evidence is so beneficial and necessary, for all practisers in the Law, that none can know too much, be too well versed, or too often conversant in it. Therefore to compleat this Treatise, especially in this particular I have trained the Law-Books of all, or the most principal Cases relating to it; and have added some Observations very fit for the Unlearned to know, and I hope not fit for the Learned to reject.

Note, The Chapter of Verdicts gives much light to know what Evidence is good and what not.

TH[illegible]

THE TABLE

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